NLWJC - KAGAN

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TOYOTA OF FLORENCE, INC., Plaintiff, v. DANNY RAY LYNCH; JM FAMILY ENTERPRISES, INC.; SOUTHEAST TOYOTA DISTRIBUTORS, INC.; TENDER LOVING CARE CORP.; WORLD OMNI FINANCIAL CORP.; WORLD OMNI LEASING, INC.; JOYSERV CO., LTD.; CARNETT-PARTSNETT SYSTEMS, INC.; TOYOGUARD, INC.; JAMES D. MORAN; JOHN JOSEPH MCNALLY; TERRY MOORE; WILLIAM M. DONOHOE; ORVILLE VERNON; AL HENDRICKSON; ROBERT MACGREGOR; DENNIS PUSKARIK; TOM NARDELLI; and TOYOTA MOTOR SALES, U.S.A., INC., Defendants. RICHARD L. BEASLEY, Plaintiff, v. DANNY RAY LYNCH; JM FAMILY ENTERPRISES, INC.; SOUTHEAST TOYOTA DISTRIBUTORS, INC.; TENDER LOVING CARE CORP.; WORLD OMNI FINANCIAL CORP.; WORLD OMNI LEASING, INC.; JOYSERV CO., LTD.; CARNETT-PARTSNETT SYSTEMS, INC.; TOYOGUARD, INC.; JAMES D. MORAN; JOHN JOSEPH MCNALLY; TERRY MOORE; WILLIAM M. DONOHOE; ORVILLE VERNON; AL HENDRICKSON; ROBERT MACGREGOR; DENNIS PUSKARIK; TOM NARDELLI and TOYOTA MOTOR SALES, U.S.A., INC., Defendants

→ REMOVAL ISSUE §1441(c) — ISSUES NOT REMOVABLE & CASE REMANDED TO ST. CT.

C/A Nos. 4:89-594-15, 4:89-595-15

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, FLORENCE DIVISION

713 F. Supp. 898; 1989 U.S. Dist. LEXIS 5968

May 24, 1989, Decided
May 24, 1989, Filed

COUNSEL: D. Kenneth Baker, Esquire, Baker & Jackson, Darlington, South Carolina, Attorney for Plaintiffs.

Hardwick Stuart, Jr., Esquire, Adams Quackenbush Herring & Stuart, Columbia, South Carolina, Raymond W. Bergan, Esquire, Daniel F. Katz, Esquire, Elena Kagan, Esquire, Williams & Connolly, Washington, District of Columbia, Attorneys for the JM Family, Defendants.

Stephen G. Morrison, Esquire, Nina Nelson Smith, Esquire, David E. Dukes, Esquire, James M. Griffin, Esquire, Nelson, Mullins, Riley & Scarborough, Columbia, South Carolina, Attorneys for Defendant, Toyota Motor Sales, U.S.A., Inc.

JUDGES: Clyde H. Hamilton, United States District Judge.

OPINIONBY: HAMILTON

OPINION: [**1]

[*898] CONSOLIDATED ORDER

CLYDE H. HAMILTON, UNITED STATES DISTRICT JUDGE:

These cases arise out of an allegedly fraudulent and deceptive scheme designed to ruin plaintiffs financially. Both actions were originally brought in the Court of Common Pleas for Darlington County and were subsequently removed

to this court under 28 U.S.C. @ 1441(b) and (c) on March 13, 1989. n1 Toyota of Florence (TOF), plaintiff [*899] in Civil Action No. 4:89-594-15, and Richard L. Beasley (Beasley), plaintiff in Civil Action No. 4:89-595-15, both filed motions to remand on March 23, 1989. n2

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n1 All of the defendants joined in the petition for removal except Danny Ray Lynch and Toyota Motor Sales, U.S.A., Inc. (TMS). These remaining defendants are collectively referred to by counsel as the "JM Family defendants" -- apparently due to the interlocking nature of these corporations and the fact that the remaining individual defendants are employed by one of more of these entities. [**2]

n2 Aside from minor differences not relevant to the court's disposition of these motions, both complaints are virtually identical. Because of this similarity, both complaints will hereafter be referred to as "the complaint."

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Plaintiffs allege seven (7) causes of action in their complaint against nineteen (19) corporate and individual defendants. Claims one through five are directed against all defendants and include common law and statutory causes of action, including: fraud, the Racketeer Influenced and Corrupt Organizations Act (RICO), civil conspiracy, the South Carolina Dealer's Day in Court Act, and the South Carolina Unfair Trade Practices Act. Claims six and seven, alleging breach of contract and breach of contract accompanied by fraudulent acts, are directed solely against defendant Southeast Toyota Distributors, Inc. (SET). n3

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n3 Plaintiffs TOF and Richard L. Beasley are both domiciled in South Carolina. Defendant Danny Ray Lynch is also domiciled in South Carolina. The remaining defendants are domiciled outside the state of South Carolina. Consequently, complete diversity does not exist for purposes of 28 U.S.C. @ 1332. Nevertheless, claims six and seven in plaintiffs' complaint are directed solely against a completely diverse defendant, SET. This minimal diversity between plaintiffs and SET establishes the jurisdictional prerequisite necessary for removal of separate and independent claims or causes of action pursuant to @ 1441(c).

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[**3]

Plaintiffs contend that removal of these entire actions is not appropriate under either @ 1441(c) or (b). First, plaintiffs contend that the RICO claim does not vest this court with jurisdiction to the exclusion of the state court. n4 Plaintiffs also assert that removal under @ 1441(b) is improper because defendants Toyota Motor Sales, U.S.A., Inc. (TMS) and Danny Ray Lynch (Lynch) did not join in the removal petition. Plaintiffs also argue that this court should remand all claims pursuant to @ 1441(c) except claims six and seven, which they purportedly concede are "separate and independent" for purposes of that statute. Additionally, plaintiffs would have this court stay proceedings involving claims six and seven while the remaining claims are adjudicated in the state court. n5

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n4 Of course, this assertion can be summarily dismissed. Although concurrent jurisdiction exists for state courts to entertain RICO claims, Brandenburg v. Seidel, 859 F.2d 1179, 1195 (4th Cir. 1988), it is clear that a properly removed action would vest this court with jurisdiction to the exclusion of the state court except in extraordinary circumstances not present here.

n5 In Civil Action No. 4:89-0595-15 plaintiff also argues that removal is improper because the petition does not identify Richard Beasley by name or citizenship and thus is deficient under the terms of 28 U.S.C. @ 1446(a) for failure to state facts entitling defendants to remove. A technical defect of this nature might be corrected, as defendants note, by leave to amend the removal petition. Kinney v. Columbia Savings & Loan Ass'n, 191 U.S. 78, 48 L. Ed. 103, 24 S. Ct. 30 (1903); D.J. McDuffie, Inc. v. Old Reliable Fire Ins. Co., 608 F.2d 145, 146-47 (5th Cir. 1979), cert. denied, 449 U.S. 830, 66 L. Ed. 2d 35, 101 S. Ct. 97 (1980). Because a more fundamental defect in both actions constrains this court to grant the respective motions to remand, a definitive ruling on this matter is not necessary.

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The JM Family defendants argue, however, that removal under @ 1441(c) is proper because the plaintiffs "concede" that the claims asserted against SET are separate and independent and thus that this court should retain jurisdiction of all claims in these cases due to "the close ties between SET and the other JM Family defendants" to prevent "massive waste of judicial resources, duplication of effort, and inconvenience to the parties and witnesses . . . ." These defendants further assert that the propriety of removal under @ 1441(b) need not be addressed because removal under @ 1441(c) is proper.

It is well settled, however, that federal jurisdiction cannot be conferred by mere concession of a litigant or even by mutual agreement of the parties where jurisdiction is otherwise improper. Rather, the Supreme Court has consistently instructed lower federal courts to carefully guard "against expansion [of federal jurisdiction] by judicial interpretation or by . . . [*900] consent of [the] parties." American Fire & Casualty Co. v. Finn, 341 U.S. 6, 17-18, 71 S. Ct. 534, 95 L. Ed. 702 (1951). Accord Owen Equipment & Erection Company v. Kroger, 437 U.S. 365, 374, 98 S. Ct. 2396, 2403, 57 L. Ed. 2d [**5] 274 (1978). This circuit recently reaffirmed the duty of a federal court to evaluate its jurisdiction sua sponte in Davis v. Pak, 856 F.2d 648 (4th Cir. 1988). As stated by the court: "it is always incumbent upon a federal court to evaluate its jurisdiction sua sponte, to ensure that it does not decide controversies beyond its authority." Id. at 650. See Rule 12(h)(3), Fed. R. Civ. Proc. Consequently, the mere fact that plaintiff may think claims six and seven are separate and independent from the remaining claims does not preclude this court from evaluating this jurisdictional prerequisite to removal under @ 1441(c) as the JM Family defendants seem to imply.

The duty of a federal district court to assess its jurisdiction sua sponte is critical because the statutory right of removal "exists only in certain enumerated classes of actions, and in order to exercise the right of removal, it is essential that the case be shown to be one within one of those classes."

Hinks v. Associated Press, 704 F. Supp. 638, 639 (D.S.C. 1988) (quoting Voors v. National Women's Health Organization, Inc., 611 F. Supp. 203, 205 (N.D.Ind. 1985)); Chesapeake & Ohio Railway Co. [**6] v. Cockrell, 232 U.S. 146, 151, 34 S. Ct. 278, 279, 58 L. Ed. 544 (1914). The removing party bears the burden of establishing its right to a federal forum. P.P. Farmers' Elevator Co. v. Farmers Elevator Mutual Ins. Co., 395 F.2d 546, 548 (5th Cir. 1968); American Buildings Co. v. Varicon, Inc., 616 F. Supp. 641, 643 (D.Mass. 1985). This court's reading of the removal statutes must also "reflect the clear congressional intention to restrict removal." Able v. Upjohn Co., Inc., 829 F.2d 1330, 1332 (4th Cir. 1987), cert. denied, 485 U.S. 963, 108 S. Ct. 1229, 99 L. Ed. 2d 429 (1988); McKay v. Boyd Construction Co., Inc., 769 F.2d 1084, 1087 (5th Cir. 1985); Ontiveros v. Anderson, 635 F. Supp. 216, 220 (N.D.Ill. 1986). Indeed, this congressional intention has uniformly led courts to resolve doubts about the propriety of removal in favor of retained state court jurisdiction. Able, 829 F.2d at 1332; Jones v. General Tire & Rubber Co., 541 F.2d 660, 664 (7th Cir. 1976); Greenshields v. Warren Petroleum Corp., 248 F.2d 61, 65 (10th Cir.), cert. denied, 355 U.S. 907, 78 S. Ct. 334, 2 L. Ed. 2d 262 (1957); Adams v. Aero Services International, Inc., 657 F. Supp. 519, 521 [**7] (E.D.Va. 1987). n6 Perhaps most important, although state law may be relevant in determining the nature of the claims to which the federal test is applied, it is well established that removability under @ 1441 is ultimately a federal law determination. Grubbs v. General Electric Credit Corp., 405 U.S. 699, 706, 92 S. Ct. 1344, 1349, 31 L. Ed. 2d 612 (1972); Able, 829 F.2d at 1333 n. 2; 14A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure @ 3724, at 396-97.

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n6 Several important policy considerations support this approach, including (1) due regard for the rightful independence of state governments, Shamrock Oil & Gas Corporation v. Sheets, 313 U.S. 100, 108-09, 61 S. Ct. 868, 872, 85 L. Ed. 1214 (1941); (2) ensuring that judgments obtained in a federal forum are not vacated on appeal due to improvident removal, see Finn, 341 U.S. 6, 71 S. Ct. 534, 95 L. Ed. 702 (1951); and (3) deference to plaintiff's chosen forum. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981).

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The removability determination is conducted solely by reference to plaintiff's course of pleading, subject to certain exceptions not asserted [**8] by any party to these actions. Finn, 341 U.S. at 14, 71 S. Ct. at 540; Paxton v. Weaver, 553 F.2d 936, 938 (5th Cir. 1977) (plaintiff's state court pleading controls removability); Union Planters National Bank of Memphis v. CBS, Inc., 557 F.2d 84, 89 (6th Cir. 1977); Her Majesty Industries, Inc. v. Liberty Mutual Insurance Co., 379 F. Supp. 658, 662 (D.S.C. 1974). Importantly, the court must also refrain from determining the merits of a claim upon a motion to remand. 29 Federal Procedure, Lawyers Edition @ 69:115, at 589 (1984). In light of these firmly established principles, this court must evaluate the propriety of removal by the JM Family defendants under @ 1441(c), or, alternatively, pursuant to @ 1441(b). Because [*901] the court has determined that these cases were removed improvidently and without jurisdiction, it is constrained to remand both cases to state court. 28 U.S.C. @ 1447(c).

The primary thrust of plaintiffs' complaint asserts that the JM Family corporate and individual defendants n7 "conspired, combined and concurred with

the Defendant Danny Ray Lynch to induce [TOF and Beasley] to invest in Toyota of Florence, Inc. and, with Lynch, to purchase or agree [**9] to purchase the Cherokee Toyota Dealership, to pay large sums of money to Cherokee Toyota and Jordan [apparently the former owner of Cherokee Toyota] for the purchase, to commit to guarantees of future payment of even larger sums, and to undergo large financial losses as a result thereof." Complaint, para. 33. Obviously, various representations were made to plaintiff Beasley by representatives of the various JM Family defendants, and, in addition, Beasley and SET executed the Toyota Dealership Agreement as an integral part of these arrangements. n8 Interestingly, the main thrust of plaintiffs' factual allegations in the complaint are found within the fraud claim. According to the complaint, plaintiff Beasley was "coaxed and encouraged to actively solicit purchase of the Jordan interests" through various representations and misrepresentations by the defendants. Complaint, para. 37-44. Paragraph 39(h) alleges that "SET violated its fiduciary and contractual obligation to assist with competent management and assistance . . . ." (emphasis added). Indeed, plaintiffs' sixth claim for relief, breach of contract, alleges that defendant SET breached the dealer agreement "as set forth in [**10] Paragraph 39, causing the Plaintiff to be damaged as set forth in Paragraph 44." Paragraphs 39 and 44, of course, are alleged as part of plaintiffs' fraud claim. The same pattern is followed for plaintiffs' seventh claim for relief, wherein plaintiffs merely assert that "the deceitful and fraudulent acts accompanying its breach of contract" give rise to relief for breach of contract accompanied by fraudulent acts. Thus, the complaint alleges that the same facts giving rise to the fraud claim also give rise to the claims asserted only against SET. Accordingly, the propriety of removal under 28 U.S.C. @ 1441(c), or, alternatively, @ 1441(b), must be examined in light of plaintiffs' allegations in the complaint.

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n7 The JM Family defendants include all defendants except Lynch and TMS. According to the complaint, all of the corporate JM Family defendants were founded by individual defendant James M. Moran. The complaint also alleges that Moran currently serves as the major stockholder and Chairman of the Board of Directors of JM Family, a holding company for numerous wholly owned subsidiaries including defendants SET, Tender Loving Care Corp., and World Omni Leasing. In addition, the complaint alleges that JM Family owns ninety-five (95%) percent of the defendant World Omni Financial Corp. Moran also serves as Chairman of the Board of Directors of SET. The complaint further asserts that SET is the parent company of the defendants Joyserv Co., LTD. and Carnett-Partsnett Systems, Inc. Complaint, paras. 3, 4, and 11. [**11]

n8 According to the complaint, all of the individual defendants except Lynch are employed by JM Family or one or more of its subsidiaries. Complaint, paras. 11-20.

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Removal of "separate and independent" claim under @ 1441(c)

The JM Family defendants first contend that removal is appropriate under 28 U.S.C. @ 1441(c). That statute provides:

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise

non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

The Supreme Court has instructed lower federal courts to apply a restrictive interpretation of "separate and independent claim or cause of action" for purposes of removal jurisdiction under @ 1441(c). American Fire & Casualty Co. v. Finn, 341 U.S. 6, 71 S. Ct. 534, 95 L. Ed. 702 (1951). According to the Finn Court, there is no separate and independent claim or cause of action under @ 1441(c) where the [*902] relief sought arises "from an interlocked series of transactions," [**12] referred to as the "single wrong" test, or where the allegations against a defendant not entitled to 1441(c) removal "involve substantially the same facts and transactions as do the allegations. . . ." against the party alleging the right to removal under that provision. Id. at 14, 16, 71 S. Ct. at 540-41.

Several important considerations presumably led the Finn Court to adopt a restrictive view of 1441(c) removal. As an initial matter, the Court concluded that Congress had intended to restrict the availability of removal through enactment of @ 1441(c). Comparing the operative terms of @ 1441(c) with the terminology of its predecessor, old 28 U.S.C. @ 71, the Court stated:

The addition of the word 'independent' gives emphasis to congressional intention to require more complete disassociation between the federally cognizable proceedings and those cognizable only in state courts before allowing removal.

341 U.S. at 12 (footnotes omitted). Perhaps most important, the Court recognized the inherent danger in adopting a relaxed test for removal under @ 1441(c). Specifically, the Finn Court determined that allowing a federal trial court to render a judgment in a case improvidently [**13] removed from state court would work a "wrongful extension of federal jurisdiction and give district courts power the Congress has denied them." 341 U.S. at 18. Indeed, the Finn Court itself was forced to vacate a lower court judgment which had been rendered improvidently and without jurisdiction. Id. at 17-19. n9

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n9 Ironically, this action by the Court accrued to the benefit of the party which had initially removed the case to federal court. Apparently due to the importance of preventing the improper assertion of federal jurisdiction, the Court refused to apply estoppel in this context.

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At least one commentator has suggested that removal is appropriate under the Finn interpretation of @ 1441(c) only where a claim is "entirely unrelated" from the remaining causes of action. According to Wright & Miller:

most commentators agree that few, if any, diversity cases can be properly removed under section 1441(c) in light of the construction placed on the statute by the Finn case. . . .

. . . .

In only one situation could legitimate joinder under usual state joinder rules produce a claim or cause of action removable under Finn. Assume that a California plaintiff [**14] brings suit in a California state court and properly joins a California defendant and a Texas defendant. Plaintiff then adds an entirely unrelated claim against the Texas defendant. . . .

C. Wright, A. Miller, & E. Cooper, supra, @ 3724, at 367-69 (footnotes omitted) (emphasis added). Accordingly, it is clear that @ 1441(c) removal is not appropriate where plaintiff's claims arise from the same series of transactions or occurrences or where substantially the same facts give rise to each claim. Indeed, according to the treatise, only "entirely unrelated" claims are removable under that provision.

Although the precise scope of removal under @ 1441(c) is somewhat uncertain, several guiding principles have evolved to assist in the determination. First, the mere fact that plaintiffs have asserted multiple claims against multiple parties is not necessarily controlling to the @ 1441(c) determination. Able, 829 F.2d at 1332; Clarence E. Morris, Inc. v. Vitek, 412 F.2d 1174, 1175 (9th Cir. 1969); Addison v. Gulf Coast Contracting Services, Inc., 744 F.2d 494, 500 (5th Cir. 1984). Specifically, "the assertion of contract and tort claims does not necessarily yield separate [**15] and independent causes of action." Paxton v. Weaver, 553 F.2d at 936, 941 (footnote omitted). Where all damages arise "from a single incident" or all claims involve "substantially the same facts," invasion of a single, primary right is indicated. Addison, 744 F.2d at 500.

Mayflower Industries v. Thor Corp., 184 F.2d 537 (3d Cir. 1950), cert. denied, 341 U.S. 903, 71 S. Ct. 610, 95 L. Ed. 1342 (1951) is instructive to the removability determination [*903] in a commercial setting. n10 There, plaintiff alleged a breach of contract claim against a diverse defendant, Thor Corporation, and a conspiracy claim against both Thor and a nondiverse defendant, Teldisco Corporation. Defendant Thor, against whom the breach of contract action was asserted, removed the action to federal district court. Because diversity did not exist between the plaintiff and Teldisco, the issue before the court was whether the plaintiff-Thor controversy and the plaintiff-Teldisco controversy presented separate and independent claims or causes of action. Noting that the language of @ 1441(c) was intended to restrict the right of removal, the court determined that the adjectives "separate and independent" [**16] were intended to convey "some meaning which would not have been apparent from the use of one adjective alone." 184 F.2d at 538. Emphasizing the nature of the business transactions which gave rise to the allegations in the complaint, the court found that the two claims were "at most but two aspects of a single economic injury." Id. at 539. The court also found that the facts allegedly giving rise to the breach of contract action likewise constituted the principal issue to proper resolution of the conspiracy claim. In fact, the court found "almost complete coincidence of the basic operative facts" between the two claims. 184 F.2d at 539. Finally, the court determined that removal of the action was not necessary in order to avoid the possibility of local prejudice against outsiders, which the court determined was the principal justification for diversity jurisdiction, due to the presence of a nondiverse defendant. Id.

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n10 Interestingly, the Supreme Court denied certiorari in the Thor decision during the same term in which it issued the Finn opinion. Apparently, many of

the ideas contained in the Thor decision found favor with members of the Court, and many of the same concepts are found in both opinions.

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Likewise, plaintiffs have alleged a single economic injury arising from their relationship with the JM Family defendants and defendant Lynch, and have alleged the same operative facts to support their claims against all defendants (including SET) as those alleged to support causes of action for breach of contract and breach of contract accompanied by fraudulent acts against SET only. As in Thor, the plaintiffs here allege that the JM Family corporate and individual defendants "conspired" with defendant Lynch to cause TOF and Beasley financial harm. Complaint, para. 33. In addition, plaintiffs premise their claims for alleged breach of contract and breach of contract accompanied by fraudulent act on the same facts as alleged within the fraud claim for relief. Complaint, paras. 64, 66. Under the Thor court's analysis, therefore, it is clear that the two claims asserted against SET are not separate and independent within the meaning of @ 1441(c).

More recent judicial pronouncements under @ 1441(c) reinforce this conclusion. Indeed, the First Circuit has determined that the "single wrong" rule "should not be perceived as articulating an exhaustive test for applying @ 1441(c)." [**18] New England Concrete Pipe Corp. v. D/C Systems of New England, Inc., 658 F.2d 867, 874 n. 12 (1st Cir. 1981). Regardless of how many "wrongs" comprise a particular action, the court determined that the inquiry should focus instead on whether "those wrongs arise from an interlocked series of transactions, that is, whether they substantially derive from the same facts." Id. To support its assertion, the court noted that the congressional intent to restrict removal would not be served by conferring federal jurisdiction where one of these alternate tests was met. Id.

Application of this more recent corollary of the Finn decision confirms that defendant SET has not carried its burden of establishing its right to removal under @ 1441(c). As already stated, plaintiffs essentially allege that the JM Family defendants and defendant Lynch conspired to cause them economic harm. Perhaps even more important, all claims derive from substantially the same facts, and the dealership agreement executed between SET and plaintiffs, according to the allegations in the complaint, formed merely one event in [*904] an interlocked series of transactions necessary to fraudulently entice plaintiffs [**19] into certain business relationships. Thus, it is clear that no right to removal exists in the present cases. n11

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n11 The New England Concrete Pipe court concluded that decisions which have emphasized the distinct legal basis of claims, while disregarding the relationship of the claims, constitute an erroneous interpretation of @ 1441(c). See Twentieth Century-Fox Film Corp. v. Taylor, 239 F. Supp. 913 (S.D.N.Y. 1965). In any event, the present facts are clearly distinguishable from the rationale used to allow removal in Twentieth Century-Fox, where two separate contracts allegedly involving different "operative facts" were involved, id. at 917-18, since in the present cases the same facts that allegedly give rise to the breach of contract claim at issue also allegedly give rise to the other causes of action.

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Another case supporting remand of the present actions is Union Planters National Bank of Memphis v. CBS, Inc., 557 F.2d 84 (6th Cir. 1977). Plaintiff brought suit to collect on a defaulted note against the debtor and its affiliates. Plaintiff also sought recovery against a diverse defendant for alleged tortious conduct. Although the district court denied [**20] plaintiff's motion for remand, on grounds that plaintiff had attempted to combine two separate and independent causes of action in its complaint, the court of appeals reversed. The court of appeals concluded that the wrong asserted against the nondiverse defendant sounded in contract whereas the wrong asserted against the diverse defendant sounded in tort. Nevertheless, the court noted that plaintiff's use of separate counts to plead different legal theories did not automatically render them separate and independent. Rather, the court reasoned that removability must be determined by reference to the complaint as a whole. As stated by the court:

the fact that Union Planters utilized separate counts to plead different legal theories, one sounding in contract and the other in tort, does not automatically make them separate and independent. The complaint will be considered as a whole and the issue of removal determined on that basis.

Id at 89. Significantly, the court also stated that the different measure of damages inherent in the contract and tort theories of recovery did not render the claims separate and independent. Id. at 90. Application of this test led the court [**21] to conclude that the removing party had not established its right to a federal forum due to the interlocked series of transactions allegedly giving rise to both claims. Hence, the court directed that the case be remanded to state court. Id.

Similarly, plaintiffs here allege fraud, civil conspiracy, and various statutory claims against all defendants and breach of contract and breach of contract accompanied by fraudulent acts against SET only. Considering the allegations of the complaint as a whole, it is clear that the same facts pleaded to support the fraud claim are merely realleged to support the claims asserted against defendant SET. Thus, it is clear that no right of removal exists in these cases. See City of Morganton, West Virginia v. Kelly, Gidley, Blair & Wolfe, Inc., 637 F. Supp. 1153 (N.D.W.Va. 1986); Bartow v. State Farm Mutual Automobile Insurance Co. 531 F. Supp. 20 (W.D.Mo. 1981).

Village Improvement Association of Doylestown, P.A. v. Dow Chemical Co., 655 F. Supp. 311 (E.D.Pa. 1987) also rejects the JM Family defendants' attempt to remove these actions. In that case, thirty (30) counts were asserted against nine (9) separate defendants, including claims [**22] for misrepresentation, breach of contract, and RICO. Significantly, each defendant was involved to some degree in the design and construction of a hospital or with the manufacture of component parts thereof. Indeed, the entire action essentially revolved around the use of a certain chemical compound manufactured by defendant Dow. Concluding that the allegations supporting the purported separate and independent claim were, at least in part, identical to the allegations contained in plaintiff's other claims, the court granted plaintiff's motion to remand. In support of its decision, the court noted that all nine claims would demand proof of similar facts and that all claims allegedly arose from substantially [*905] the same underlying facts and transactions. Id. at 317.

The present action revolves around the dealership agreement executed between plaintiffs and SET. In fact, the signing of this agreement was one step in a series of transactions which placed plaintiffs in a position to interact with all of the JM Family entities and TMS. Whereas the facts allegedly giving rise to a separate and independent claim in Village Improvement Association were at least partially identical to [**23] the allegations proffered to support the remaining claims, the facts allegedly supporting both claims against defendant SET are "identical" to the factual averments supporting the remaining claims. Hence, it is clear that removal is not appropriate on the present facts. n12

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n12 Curiously, the JM Family defendants argue that this court should allow removal of the purported separate and independent claims and, as a consequence, also retain jurisdiction over both actions due to the "close ties" between all of the JM Family defendants. This very assertion, however, has been deemed a compelling argument against the alleged claimed right of removal -- by admitting, "that the matter does not present, insofar as the removing defendants are concerned, a separate and completely independent claim or cause of action." South Carolina Electric & Gas Co. v. Aetna Insurance Co., 114 F. Supp. 79, 82 (D.S.C. 1953).

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Removal of RICO claim under @ 1441(b)

The JM Family defendants also contend that removal is proper due to the presence of the RICO claim. Plaintiffs oppose removal on this basis, contending that removal is improper because all defendants did not properly join in the removal petition. [**24] This court agrees. It is well established that removal under @ 1441(b) is improper where all defendants do not join in or consent to the removal petition. Gableman v. Peoria, Decatur & Evansville Railway Co., 179 U.S. 335, 21 S. Ct. 171, 45 L. Ed. 220 (1900); Perpetual Building & Loan Association v. Series Directors of Equitable Building & Loan Association Series Number 52, 194 F. Supp. 6, 217 F.2d 1 (4th Cir. 1954), cert. denied, 349 U.S. 911, 75 S. Ct. 599, 99 L. Ed. 1246 (1955); Tri-Cities Newspapers v. Tri-Cities Printing Pressmen, 427 F.2d 325, 326-27 (5th Cir. 1970); Adams v. Aero Services International, Inc., 657 F. Supp. 519 (E.D.Va. 1987); Heatherington v. Alied Van Lines, Inc., 194 F. Supp. 6, 7 (W.D.S.C. 1961). See C. Wright, A. Miller, & E. Cooper, supra, @ 3731, at 504-07. n13 Because the removing defendants have not shown that defendants Lynch and TMS consented to or joined in the removal petition, the attempted removal of these actions pursuant to @ 1441(b) was done improvidently and without jurisdiction.

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n13 Exceptions to this requirement exist where: (1) removal is appropriate under @ 1441(c); (2) the non-joining defendants have not been served with process at the time the removal petition was filed; or (3) those defendants which did not sign are merely nominal or formal. C. Wright, A. Miller & E. Cooper, supra, @ 3731, at 507-09. The JM Family defendants have not met their burden of showing that any of these exceptions are implicated on the present facts.

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- [**25]

Conclusion

Because well-established principles of removal jurisdiction compel this court to determine removability based upon plaintiffs' pleadings, this court is constrained to hold that these actions are not removable under @ 1441(c) or (b). Accordingly, 28 U.S.C. @ 1447(c) directs the court to remand these actions to state court.

It is therefore required that these actions be remanded to the Court of Common Pleas for Darlington County, and that all pleadings filed be made a part of these cases on remand. However, the court finds that it would be inappropriate to award plaintiffs' costs for improvident removal. A certified copy of this Order is to be mailed by the Clerk of this Court to the Clerk of the Court of Common Pleas for Darlington County, South Carolina.

IT IS SO ORDERED at Florence, South Carolina this 24th day of May, 1989.

4TH CASE of Level 1 printed in FULL format.

UNITED STATES of America, Appellee v. Kuang Hsung J. CHUANG, a/k/a "Joseph Chuang", Appellant

CRIMINAL

LOST APPEAL

Nos. 89-1309, 89-1406

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

897 F.2d 646; 1990 U.S. App. LEXIS 3178

February 7, 1990, Argued
February 28, 1990, Decided

PRIOR HISTORY:
[**1] Appeal from a judgment entered August 1, 1989, in the Southern District of New York, Miriam Goldman Cedarbaum, District Judge, upon a jury verdict, convicting appellant of misapplication of bank funds, making false statements to bank regulatory officials, other substantive counts, and conspiracy, following denial of pretrial suppression motions.

DISPOSITION: Affirmed.

COUNSEL: Herve Gouraige, Assistant United States Attorney, New York, New York (Otto G. Obermaier, United States Attorney, Martin Klotz, and Kerri M. Bartlett, Assistant United States Attorneys, on the brief) for Appellee United States of America.

Robert S. Litt, Washington, District of Columbia (Bruce S. Oliver, Elena Kagan, and Williams & Connolly, Washington, District of Columbia, on the brief) for Appellant Kuang Hsung J. Chuang.

JUDGES: Timbers, Newman and Altimari, Circuit Judges.

OPINIONBY: TIMBERS

OPINION: [*647] TIMBERS, Circuit Judge:

Appellant Kuang Hsung J. Chuang appeals from a judgment of conviction entered August 1, 1989, in the Southern District of New York, Miriam Goldman Cedarbaum, District Judge, upon a jury verdict on twenty-two counts, including misapplication of bank funds, making false statements to bank regulatory officials, other substantive counts, and conspiracy. The district [**2] court denied Chuang's pretrial motions to suppress evidence obtained from warrantless searches of his bank and law offices.

On appeal, we find that the chief claim of error raised by Chuang is that the district court erred in denying his suppression motions. Other claims of error have been raised and considered.

For the reasons which follow, we affirm the judgment of conviction.

I.

We shall summarize only those facts and prior proceedings believed necessary to an understanding of the issues raised on appeal.

Chuang was the chairman, president and chief executive officer of the Golden Pacific National Bank ("GPNB"). On June 17, 1985, after receiving information from an informant about certain activities at GPNB, the Office of the Comptroller of the Currency ("OCC") began a warrantless examination, pursuant to 12 U.S.C. @ 481 (1988), of bank records pertaining to the sale of a bank product known as "non-negotiable certificates." GPNB received no prior notice of this examination.

At about 1 P.M. on June 17, three bank examiners from the OCC entered GPNB in Manhattan and went to Chuang's office on the third floor of the six-story bank building. They produced an administrative subpoena [**3] and requested Chuang to provide [*648] documents related to the non-negotiable certificate program. In response to their request, Chuang instructed Theresa Shieh, a vice-president and cashier at GPNB, to produce the requested documents. It is undisputed that virtually all the documents reviewed by OCC examiners came from Shieh's office located on the fourth floor of the bank building; that no documents came from Chuang's office; that these documents were bank documents, not personal documents belonging to Shieh or Chuang; and that virtually all of the documents were given to the OCC upon request.

As a result of this examination, which lasted until June 21, the OCC examiners concluded that the sale of the non-negotiable certificates was fraudulent, and that Chuang had misrepresented to regulatory officials facts concerning the certificates and the use of bank funds derived from the sale of those certificates. They discovered that several hundred non-negotiable certificate customers had approximately $ 17 million in claims against GPNB. Not satisfied with the evidence concerning the assets underlying those liabilities, the OCC declined Chuang's request to liquidate the assets. The OCC determined [**4] that GPNB was insolvent and, on June 21, 1985, appointed the Federal Deposit Insurance Corporation ("FDIC") as its receiver.

The FDIC secured the bank building on the evening of Friday, June 21. The next day, it began the extensive process of examining bank documents and calculating assets and liabilities. A law firm, Chuang & Associates, owned by Chuang, was located on the third floor of the bank building. As part of its examination of GPNB, the FDIC searched the third floor offices of Chuang and his secretary where they performed both bank and law firm work.

On May 19, 1987, Chuang was indicted, together with Shieh, in a 48-count indictment. Prior to trial, defendants moved to dismiss the indictment on various grounds, including duplicity and failure to state an offense. They also moved to suppress the evidence obtained by the OCC during its warrantless examination of GPNB and evidence obtained by the FDIC during its warrantless examination of the offices of Chuang and his secretary. The district court denied these motions.

Prior to trial, two superseding indictments were returned and several counts were severed. At the close of the government's case, several counts were dismissed [**5] by the district court. The case was submitted to the jury on twenty-two counts. Count One charged Chuang and Shieh with conspiring to defraud the United States, to misapply bank funds, and to make false statements to bank regulatory officials and agencies, in violation of 18 U.S.C. @ 371 (1988). Counts Two through Eleven charged both defendants with making false statements and concealing bank deposits from bank regulatory agencies, in violation of 18 U.S.C. @ 1001 (1988). Counts Twelve through Fourteen charged both defendants

with making false statements to bank regulatory officials and agencies, in violation of 18 U.S.C. @ 1001. Counts Fifteen through Twenty charged both defendants with misapplication of bank funds, in violation of 18 U.S.C. @ 656 (1988). Count Twenty-One charged Chuang with conspiracy to cover up illegal campaign contributions made with bank funds, in violation of 18 U.S.C. @ 371. Count Twenty-Two charged both defendants with wire fraud, in violation of 18 U.S.C. @ 1343 (1988).

The essence of the government's case was that defendants defrauded bank customers by selling ordinary certificates of deposit called "non-negotiable certificates"; that they diverted the funds [**6] received to personal businesses without informing the customers or GPNB's board of directors and without insuring the funds with the FDIC; and that they misrepresented the facts regarding the non-negotiable certificate program to bank regulatory officials.

The jury trial began on September 26, 1988 and concluded on January 18, 1989, when the jury returned guilty verdicts against both defendants on all 22 counts. On June 1, 1989, the district court sentenced Chuang to concurrent five year terms of imprisonment on all counts. On August 1, 1989, the court ordered Chuang to comply fully with all the terms of a [*649] settlement agreement with the FDIC and to make restitution of $ 200,000.

This appeal by Chuang followed.

II.

Chuang's chief claim of error centers upon two discreet searches made respectively by the OCC and the FDIC.

We turn first to the propriety of the district court's order denying the motion to suppress documents obtained by the OCC's warrantless search.

In his motion to suppress bank documents obtained by the OCC during its June 1985 examination of GPNB pursuant to 12 U.S.C. @ 481 (1988), Chuang asserted that the examination violated the Fourth Amendment. Specifically, he claimed [**7] that @ 481, which authorizes warrantless examinations of national banks, is unconstitutional on the ground that it does not provide "a constitutionally adequate substitute for a warrant", as required by the Supreme Court in New York v. Burger, 482 U.S. 691, 703, 96 L. Ed. 2d 601, 107 S. Ct. 2636 (1987). Observing that none of the documents inspected by the OCC was obtained from Chuang's office, the district court ruled that Chuang lacked standing to challenge the OCC's examination of GPNB. Chuang asserts that the district court erred in this determination. He renews on appeal his claim that @ 481 is unconstitutional. We need not address the merits of this constitutional challenge since we agree with the district court that Chuang has not established a legitimate expectation of privacy in the bank documents examined by the OCC.

In reviewing the district court's determination that Chuang lacked standing, we are mindful that the Supreme Court has dispensed with the notion of standing as being theoretically distinct from the substantive merits of a Fourth Amendment claim. Rakas v. Illinois, 439 U.S. 128, 133, 140, 58 L. Ed. 2d 387, 99 S. Ct. 421 (1978). In Rakas, the Court concluded that "the better analysis forthrightly focuses on the extent of a particular [**8] defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing." Id. at 139. Put another way, the

proper inquiry turns on whether "the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." Id. at 140.

With Rakas in mind, we focus on whether defendant has established a legitimate expectation of privacy in the area searched. United States v. Rahme, 813 F.2d 31, 34 (2 Cir. 1987); United States v. Smith, 621 F.2d 483, 486 (2 Cir. 1980), cert. denied, 449 U.S. 1086, 66 L. Ed. 2d 812, 101 S. Ct. 875 (1981); United States v. Brien, 617 F.2d 299, 305 (1 Cir.), cert. denied, 446 U.S. 919, 64 L. Ed. 2d 273, 100 S. Ct. 1854 (1980). This threshold question involves two separate inquiries: first, Chuang must demonstrate a subjective expectation of privacy in a searched place or item; and second, his expectation must be one that society accepts as reasonable. United States v. Paulino, 850 F.2d 93, 97 (2 Cir. 1988), cert. denied, 490 U.S. 1052, 109 S. Ct. 1967, 104 L. Ed. 2d 435 (1989).

It is well-settled that a corporate officer or employee in certain circumstances may assert a reasonable expectation of privacy in his corporate office, and may have standing [**9] with respect to searches of corporate premises and records. See, e.g., United States v. Leary, 846 F.2d 592, 595-96 (10 Cir. 1988); United States v. Brien, supra, 617 F.2d at 305-06; United States v. Lefkowitz, 464 F. Supp. 227, 230-31 (C.D.Cal. 1979), aff'd, 618 F.2d 1313 (9 Cir.), cert. denied, 449 U.S. 824, 66 L. Ed. 2d 27, 101 S. Ct. 86 (1980); see also Mancusi v. DeForte, 392 U.S. 364, 369, 20 L. Ed. 2d 1154, 88 S. Ct. 2120 (1968) ("one has standing to object to a search of his office, as well as of his home"). The question whether a corporate officer has a reasonable expectation of privacy to challenge a search of business premises focuses principally on whether he has made a sufficient showing of a possessory or proprietary interest in the area searched. E.g., United States v. Brien, supra, 617 F.2d at 305-06; United States v. Lefkowitz, supra, 464 F. Supp. at 230-31. Moreover, he must demonstrate a sufficient "nexus between the area searched and [his own] work space." United States v. Britt, 508 F.2d 1052, 1056 (5 Cir.), cert. denied, 423 U.S. 825, 46 L. Ed. 2d 42, 96 S. Ct. 40 (1975). The presence of these [*650] factors necessarily must be determined on a case-by-case basis. Cf. O'Connor v. Ortega, 480 U.S. 709, 718, 94 L. Ed. 2d 714, 107 S. Ct. 1492 (1987) ("Given the great variety of work environments in [**10] the public sector, the question of whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis.").

Chuang asserts that, as a corporate officer of the bank, he established a sufficient expectation of privacy in the bank premises to dispute the legality of OCC's examination. He claims that he had a significant proprietary interest in the bank, since he or his family owned almost half of all outstanding bank stock at the time the bank was closed. He also claims that he exercised significant operational control over the bank and all of its premises, and that the areas searched were non-public areas over which ultimate control rested in his hands. Further, he points out that he was present during OCC's examination of the bank. In view of the context in which OCC conducted its search, however, we hold that these factors were insufficient to establish a cognizable Fourth Amendment claim.

We observe that the bulk of the bank documents produced for the OCC were obtained from the office of another officer of the bank, Theresa Shieh. Her office was located on the fourth floor of the bank building. None of the documents came from Chuang's office on the [**11] third floor. Chuang

failed to demonstrate a sufficient nexus between the areas from which the documents were obtained and his own office. Moreover, all of the documents examined were bank documents subject to periodic examinations by the OCC, which has a statutory duty under @ 481 to examine the affairs of every national bank at least twice a year. 12 C.F.R. @ 4.11 (1989). Under these circumstances, we are not convinced that Chuang demonstrated even a subjective desire to keep the bank documents private.

Moreover, even assuming Chuang demonstrated a subjective expectation of privacy, we cannot conclude that that expectation is one society considers reasonable. The Supreme Court has held that the "expectation [of privacy] is particularly attenuated in commercial property employed in 'closely regulated' industries." New York v. Burger, supra, 482 U.S. at 700; see also O'Connor v. Ortega, supra, 480 U.S. at 717 ("public employees' expectations of privacy in their offices, desks, and file cabinets, like similar expectations of employees in the private sector, may be reduced by virtue of . . . . legitimate regulation"). Indeed, the Court has held that "certain industries have such a [**12] history of government oversight that no reasonable expectation of privacy . . . . could exist for a proprietor over the stock of such an enterprise." Marshall v. Barlow's, Inc., 436 U.S. 307, 313, 56 L. Ed. 2d 305, 98 S. Ct. 1816 (1978) (emphasis added) (citing Katz v. United States, 389 U.S. 347, 351-52, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967)); see also O'Connor v. Ortega, supra, 480 U.S. at 718 ("some government offices may be so open to fellow employees or the public that no expectation of privacy is reasonable") (emphasis added).

In view of the pervasive nature of federal regulation of the banking industry, Chuang, as an officer of the bank, knew that bank documents, whether kept in his office or another office, were subject to periodic examination by the OCC. The existence of a regulatory scheme necessarily reduces a bank officer's expectation of privacy in his corporate office. New York v. Burger, supra, 482 U.S. at 700; O'Connor v. Ortega, supra, 480 U.S. at 717. That privacy interest is attenuated to the point where any warrantless examination of his office pursuant to a regulatory scheme may be reasonable within the meaning of the Fourth Amendment. New York v. Burger, supra, 482 U.S. at 702. This is not to say that Chuang had no legitimate [**13] expectation of privacy in his own office so as to deprive him of standing to challenge a search of that office. He still could reasonably expect that no one other than fellow employees and business or personal invitees would enter his office, and that nothing would be removed from his desk or file cabinets without his permission. Mancusi v. DeForte, supra, 392 U.S. at 369.

The bank documents examined by the OCC, however, were obtained from areas of the bank other than Chuang's office. [*651] Virtually all of them came from Shieh's office. In view of the heavily regulated nature of the banking industry, we decline to accept Chuang's assertion that he had standing to challenge the legality of the examination of those documents. The fact that Chuang, as an officer of a national bank, knew those documents were subject to periodic examination by the OCC, coupled with the fact that they were found in areas other than Chuang's office, lead us to conclude that Chuang's Fourth Amendment rights were not infringed by the OCC examination.

We do not suggest that, since banking is a heavily regulated industry, no bank officer ever can have a reasonable expectation of privacy in bank documents, and therefore [**14] that no bank officer ever can challenge

successfully an examination of the bank pursuant to @ 481. Under the circumstances of the instant case, however, where the heavily regulated nature of the banking industry diminished a bank officer's expectation of privacy in bank documents, and where those documents were obtained from areas of the bank other than the officer's own office, we decline to accept any privacy interest as objectively reasonable.

We hold that Chuang cannot successfully challenge the legality of OCC's examination of GPNB because he has not demonstrated a sufficient privacy interest in bank documents, not found in his office, that he knew were routinely subject to OCC examination.

III.

This brings us to the propriety of the district court's order denying the motion to suppress documents obtained by the FDIC's June 1985 warrantless search of the offices of Chuang and his secretary. United States v. Chuang, 696 F. Supp. 910 (S.D.N.Y. 1988).

Although the FDIC did not obtain a search warrant or seek court approval of any kind, Chuang does not challenge the authority of the FDIC, as a properly appointed receiver of GPNB pursuant to 12 U.S.C. @ 1821(d) (1988), to examine [**15] the bank itself without a warrant. He asserts, however, that his office and that of his secretary were part of his law firm, Chuang & Associates, and that the FDIC's search of those "independent law offices" went beyond any lawful authority of a receiver. We disagree.

The district court found that, based on the physical lay-out of GPNB and its close relationship to the law firm, the offices of Chuang and his secretary were "an important part of the Bank", where not only law firm business but also banking business was conducted. 696 F. Supp. at 913. The court correctly concluded, since banking is a "closely regulated" business, that Chuang voluntarily reduced the expectation of privacy in the firm's premises by operating his law firm out of the same offices from which he ran GPNB. Id. (citing New York v. Burger, supra, 482 U.S. at 700).

Moreover, the FDIC, as a properly appointed receiver of GPNB, had the power and duty pursuant to @ 1821(d) to marshal GPNB's assets and to wind up its affairs. As Chuang concedes, the FDIC as receiver stood in the shoes of GPNB and had authority to look through all of GPNB's premises and papers without a warrant. See United States v. Gordon, 655 F.2d 478, 487 [**16] (2 Cir. 1981) (Oakes, J., concurring) (when the Superintendent of Insurance acts "by virtue of his receivership powers, [he is] in effect acting as with a warrant issued upon a showing of probable cause"). We have upheld a search of a law office with a warrant as reasonable where the law office is commingled with a business that is the legitimate object of the search. National City Trading Corp. v. United States, 635 F.2d 1020, 1024-26 (2 Cir. 1980). Since the area searched by the FDIC clearly functioned as a mixed-use bank and law office for Chuang, and since the FDIC as receiver may properly search GPNB without a warrant, we agree with the district court that the FDIC search was reasonable.

We find no merit to Chuang's assertion that the FDIC had no probable cause to believe that Chuang's office and his secretary's [*652] office were used for GPNB business. United States v. Cerri, 753 F.2d 61, 62-64 (7 Cir.), cert. denied, 472 U.S. 1017, 87 L. Ed. 2d 613, 105 S. Ct. 3479 (1985) (warrantless

search of home is permissible based on probable cause that it was used for business purposes). The physical lay-out of the bank building, including the shared telephone lines of GPNB and the firm, the easy access to GPNB from [**17] the firm, and the absence of any building directory listing the firm, clearly suggested a commingling of space. Moreover, the office searched was Chuang's only office in the entire bank building. These factors constituted sufficient cause for the FDIC to believe that there was a commingling of activities in the area searched.

We hold that the district court properly denied Chuang's motion to suppress the evidence obtained by the FDIC in its search of the offices of Chuang and his secretary. In reaching this conclusion, we are mindful of the risk posed by searches of law offices which unnecessarily may intrude on attorney-client privileges. E.g., National City Trading Corp. v. United States, supra, 635 F.2d at 1026 ("a law office search should be executed with special care"). That risk, however, was not present here since neither Chuang nor any third parties sought to suppress documents on the ground that they were privileged. United States v. Chuang, supra, 696 F. Supp. at 915. Moreover, since there was sufficient cause to believe that the law offices of Chuang and his secretary were commingled with bank business, the FDIC's search of those offices was proper. National City Trading [**18] Corp. v. United States, supra, 635 F.2d at 1026.

One further matter: Chuang claims that liquor license applications, which showed that his wife owned an interest in two restaurants, were found during a search by the FDIC of the office of one of his law associates and were introduced improperly at trial. According to Chuang, they were integral to the government's proof as to the bank misapplication counts. The government maintains that those applications were obtained from the New York State Liquor Control Authority ("Liquor Authority"), rather than from Chuang's law offices. Indeed, it asserts that no files containing liquor license documents were found during the FDIC search. At trial, liquor license applications submitted to the Liquor Authority were introduced. The district court accepted the government's claim that the actual documents offered were obtained from the Liquor Authority. Since the government denies that the source of those liquor license applications was derived from the FDIC search, and denies that any copies of those documents were found during that search, we decline to disturb the district court's determination, absent any evidence to support Chuang's claim.

IV.

[**19] Chuang raises numerous other claims of error, contending that: (1) the court erred in denying his motion to sever the campaign contribution count; (2) the court erred in denying his motion to suppress the false statement counts on the ground of duplicity; (3) the government failed to plead and prove bank misapplication; (4) the evidence was legally insufficient to establish wire fraud; (5) the court improperly admitted hearsay evidence; (6) the court improperly instructed the jury on the definition of bank "deposits"; and (7) he was improperly sentenced.

We have considered carefully these contentions and hold that none has merit.

V.

To summarize:

We hold that the district court properly denied Chuang's motion to suppress the evidence obtained from the OCC's examination of GPNB. We also hold that the court properly denied Chuang's motion to suppress evidence obtained from the FDIC's search of his office and that of his secretary. We have considered carefully Chuang's other claims of error and find that none has merit.

Affirmed.

3RD CASE of Level 1 printed in FULL format.

LUKE RECORDS, INC., a Florida corporation formerly known as Skyywalker Records, Inc., et al., Plaintiffs-Appellants, v. Nick NAVARRO, Sheriff, Broward County, Florida, Defendant-Appellee.

No. 90-5508

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

960 F.2d 134; 1992 U.S. App. LEXIS 9592; 20 Media L. Rep. 1114; 6 Fla. Law W. Fed. C 532

May 7, 1992, Decided

SUBSEQUENT HISTORY: As Amended.

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Southern District of Florida. DISTRICT BANKRUPTCY COURT DOCKET NO. 90-6220-Civ-JAG. D/C Judge GONZALEZ

DISPOSITION: REVERSED.

COUNSEL: ATTORNEYS FOR APPELLANTS: B ruce Rogow, 2441 S.W. 28th Ave., Ft. Lauderdale, FL. 33312, (305) 524-2465. Allen Jacobi, 1313 N.E. 125th Street, North Miami, FL. 33161, (305) 893-4135.

(For Amicus, Home Box Office): Daniel M. Waggoner, 2600 Century Square, 1501 Fourth Ave., Seattle, WA. 98101-1688, (206) 628-7789.

For Amicus, Recording Industry Assoc. of America, Inc.: Kevin T. Baine, WILLIAMS & CONNOLLY, 839-17th Street, N.W., Washington, DC 20006; (202) 331-5000. Victoria L. Radd, 839-17th Street, N.W., Washington, DC 20006; (202) 331-5000. Elena Kagan, 839-17th Street, N.W., Washington, DC 20006; (202) 331-5000.

For Amicus, American Civil Liberties Union (ACLU): Steven F. Reich, COVINGTON & BURLING, 1201 Pensylvania Avenue., N.W., P.O. Box 7566, Washington, DC 20044; (202) 662-6000. David B. Isbell, 1201 Pensylvania Avenue., N.W., P.O. Box 7566, Washington, DC 20044; (202) 662-6000. Seth A. Tucker, 1201 Pensylvania Avenue., N.W., P.O. Box 7566, Washington, DC 20044; (202) 662-6000. Larry Corman, HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR, NCNB Bank Building, Suite 400, 2000 Glades Road, Boca Raton, FL 33431; (407) 394-0500.

On behalf of: THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF FLORIDA, INC., 225 N.W. 34th Street, Suite 208, Miami, FL 33137; (305) 576-2336.

For Amicus - Robert T. Perry: Robert T. Perry, PRO SE, 509 12th Street, Apt. 2C, Brooklyn, NY 11215 (718) 768-7578.

FOR National Association of Recording: Charles B. Ruttenberg, 1050 Connecticut Ave., N.W. Washington, D.C. 20036, (202) 857-6082. John T. Mitchell, 1050 Connecticut Ave., N.W. Washington, D.C. 20036, (202) 857-6082.

ATTORNEY FOR APPELLEE: John Jolly, 1322 S.E. Third Ave., Ft. Lauderdale, FL. 33316, (305) 462-3200.

* CONTROVERSIAL

→ WON THE APPEAL

→ DIDN'T REP. THE GROUP... ONLY RECORDING IND. OF AMERICA, INC

→ INVOLVES CENSORSHIP ISSUES

960 F.2d 134, *; 1992 U.S. App. LEXIS 9592, **1;
20 Media L. Rep. 1114; 6 Fla. Law W. Fed. C 532

JUDGES: Before ANDERSON, Circuit Judge, RONEY and LIVELY, * Senior Circuit Judges.

* Honorable Pierce Lively, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

OPINIONBY: PER CURIAM

OPINION: [*135] PER CURIAM:

In this appeal, appellants Luke Records, Inc., Luther Campbell, Mark Ross, David Hobbs, and Charles Wongwon seek reversal of the district court's declaratory judgment that the musical recording "As Nasty As They Wanna Be" is obscene under Fla.Stat. @ 847.011 and the United States Constitution, contending that the district court misapplied the test for determining obscenity. We reverse.

Appellants Luther Campbell, David Hobbs, Mark Ross, and Charles Wongwon comprise the musical group "2 Live Crew," which recorded "As Nasty As They Wanna Be." In response to actions taken by the Broward County, Florida Sheriff's Office to discourage record stores from selling "As Nasty As They Wanna Be," appellants filed this action in federal district court to enjoin the Sheriff from interfering further with the sale of the recording. The district court granted the injunction, finding that the actions of the Sheriff's [**2] office were an unconstitutional prior restraint on free speech. The Sheriff does not appeal this determination.

In addition to injunctive relief, however, appellants sought a declaratory judgment pursuant to 28 U.S.C.A. @ 2201 that the recording was not obscene. The district court found that "As Nasty As They Wanna Be" is obscene under Miller v. California. n1

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n1 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973).

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This case is apparently the first time that a court of appeals has been asked to apply the Miller test to a musical composition, which contains both instrumental music and lyrics. n2 Although we tend to agree with appellants' contention that because music possesses inherent artistic value, no work of music alone may be declared obscene, that issue is not presented in this case. The Sheriff's contention that the work is not protected by the First Amendment is based on the lyrics, not the music. The Sheriff's brief denies any intention to put rap music to the [**3] test, but states "it is [*136] abundantly obvious that it is only the 'lyrical' content which makes "As Nasty As They Wanna Be" obscene." Assuming that music is not simply a sham attempt to protect obscene material, the Miller test should be applied to the lyrics and the music of "As Nasty As They Wanna Be" as a whole. The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state

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law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. 413 U.S. at 24, 93 S. Ct. at 2615. This test is conjunctive. Penthouse Intern., Ltd. v. McAuliffe, 610 F.2d 1353, 1363 (5th Cir.1980). A work cannot be held obscene unless each element of the test has been evaluated independently and all three have been met. Id.

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n2 In a pre-Miller case, United States v. Davis, 353 F.2d 614 (2d Cir.1965), cert. denied, 384 U.S. 953, 86 S. Ct. 1567, 16 L. Ed. 2d 549 (1966), that court affirmed the conviction of a defendant for mailing obscene materials, determining that two phonograph records and labels were obscene. Justice Stewart, dissenting from the denial of certiorari, stated that one of the records "consisted almost entirely of the sounds of percussion instruments" and the other was a "transcription of passages from . . . a book of poems." 384 U.S. at 953, 86 S. Ct. at 1567.

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[**4]

Appellants contend that because the central issue in this case is whether "As Nasty As They Wanna Be" meets the definition of obscenity contained in a Florida criminal statute, the thrust of this case is criminal and the Sheriff should be required to prove the work's obscenity beyond a reasonable doubt. In the alternative, appellants assert that at minimum, the importance of the First Amendment requires that the burden of proof in the district court should have been by "clear and convincing evidence," rather than by "a preponderance of the evidence." Assuming, arguendo, that the proper standard is the preponderance of the evidence, we conclude that the Sheriff has failed to carry his burden of proof that the material is obscene by the Miller standards under that less stringent standard. Thus, to reverse the declaratory judgment that the work is obscene, we need not decide which of the standards applies.

There are two problems with this case which make it unusually difficult to review. First, the Sheriff put in no evidence but the tape recording itself. The only evidence concerning the three-part Miller test was put in evidence by the plaintiffs. Second, the case was tried [**5] by a judge without a jury, and he relied on his own expertise as to the prurient interest community standard and artistic value prongs of the Miller test.

First, the Sheriff put in no evidence other than the cassette tape. He called no expert witnesses concerning contemporary community standards, prurient interest, or serious artistic value. His evidence was the tape recording itself.

The appellants called psychologist Mary Haber, music critics Gregory Baker, John Leland and Rhodes Scholar Carlton Long. Dr. Haber testified that the tape did not appeal to the average person's prurient interest.

Gregory Baker is a staff writer for New Times Newspaper, a weekly arts and news publication supported by advertising revenue and distributed free of charge throughout South Florida. Baker testified that he authored "hundreds" of articles about popular music over the previous six or seven years. After reviewing the origins of hip hop and rap music, Baker discussed the process through which rap music is created. He then outlined the ways in which 2 Live

Crew had innovated past musical conventions within the genre and concluded that the music in "As Nasty As They Wanna Be" possesses [**6] serious musical value.

John Leland is a pop music critic for Newsday magazine, which has a daily circulation in New York, New York of approximately six hundred thousand copies, one of the top ten daily newspaper circulations in the country. Leland discussed in detail the evolution of hip hop and rap music, including the development of sampling technique by street disc jockeys over the previous fifteen years and the origins of rap in more established genres of music such as jazz, blues, and reggae. He emphasized that a Grammy Award for rap music was recently introduced, indicating that the recording industry recognizes rap as valid artistic achievement, and ultimately gave his expert opinion that 2 Live Crew's music in "As Nasty As They Wanna Be" does possess serious artistic value.

[*137] Of appellants' expert witnesses, Carlton Long testified most about the lyrics. Long is a Rhodes scholar with a Ph.D. in Political Science and was to begin an assistant professorship in that field at Columbia University in New York City shortly after the trial. Long testified that "As Nasty As They Wanna Be" contains three oral traditions, or musical conventions, known as call and response, doing the [**7] dozens, and boasting. Long testified that these oral traditions derive their roots from certain segments of Afro-American culture. Long described each of these conventions and cited examples of each one from "As Nasty As They Wanna Be." He concluded that the album reflects many aspects of the cultural heritage of poor, inner city blacks as well as the cultural experiences of 2 Live Crew. Long suggested that certain excerpts from "As Nasty As They Wanna Be" contained statements of political significance or exemplified numerous literary conventions, such as alliteration, allusion, metaphor, rhyme, and personification.

The Sheriff introduced no evidence to the contrary, except the tape.

Second, the case was tried by a judge without a jury, and he relied on his own expertise as to the community standard and artistic prongs of the Miller test.

The district court found that the relevant community was Broward, Dade, and Palm Beach Counties. He further stated:

This court finds that the relevant community standard reflects a more tolerant view of obscene speech than would other communities within the state. This finding of fact is based upon this court's personal knowledge of the [**8] community. The undersigned judge has resided in Broward County since 1958. As a practicing attorney, state prosecutor, state circuit judge, and currently, a federal district judge, the undersigned has traveled and worked in Dade, Broward, and Palm Beach. As a member of the community, he has personal knowledge of this area's demographics, culture, economics, and politics. He has attended public functions and events in all three counties and is aware of the community's concerns as reported in the media and by word of mouth.

In almost fourteen years as a state circuit judge, the undersigned gained personal knowledge of the nature of obscenity in the community while viewing dozens, if not hundreds of allegedly obscene films and other publications seized by law enforcement.

960 F.2d 134, *137; 1992 U.S. App. LEXIS 9592, **8;
20 Media L. Rep. 1114; 6 Fla. Law W. Fed. C 532

. . . . .

The plaintiffs' claim that this court cannot decide this case without expert testimony and the introduction of specific evidence on community standards is also without merit. The law does not require expert testimony in an obscenity case. The defendant introduced the Nasty recording into evidence. As noted by the Supreme Court in Paris Adult Theatre I [v. Slaton, 413 U.S. 49, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973)], [**9] when the material in question is not directed to a 'bizarre, deviant group' not within the experience of the average person, the best evidence is the material, which 'can and does speak for itself.' Paris Adult Theatre I, 413 U.S. at 56 & n. 6, 93 S. Ct. at 2634 & n. 6.

In deciding this case, the court's decision is not based upon the undersigned judge's personal opinion as to the obscenity of the work, but is an application of the law to the facts based upon the trier of fact's personal knowledge of community standards. In other words, even if the undersigned judge would not find As Nasty As They Wanna Be obscene, he would be compelled to do so if the community's standards so required. n3

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n3 Skyywalker Records, Inc. v. Navarro, 739 F. Supp. 578, 589, 590 (S.D.Fla.1990).

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It is difficult for an appellate court to review value judgments. n4 Although, generally, these determinations are made in [*138] the first instance by a jury, n5 in this case the district [**10] judge served as the fact finder, which is permissible in civil cases. n6 Because a judge served as a fact finder, however, and relied only on his own expertise, the difficulty of appellate review is enhanced. n7 A fact finder, whether a judge or jury, is limited in discretion. n8 "Our standard of review must be faithful to both Rule 52(a) and the rule of independent review." n9 "The rule of independent review assigns to appellate judges a constitutional responsibility that cannot be delegated to the trier of fact," even where that fact finder is a judge. n10

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n4 See Marks v. United States, 430 U.S. 188, 198, 97 S. Ct. 990, 996, 51 L. Ed. 2d 260 (1977) (Stevens, J., concurring in part and dissenting in part); United States v. 2,200 Paper Back Books, 565 F.2d 566, 570 & n. 7, 571 (9th Cir.1977); United States v. Obscene Magazines, Film & Cards, 541 F.2d 810, 811 (9th Cir.1976).

n5 Cf. Miller, 413 U.S. at 26-7, 93 S. Ct. at 2616.

n6 Penthouse, 610 F.2d at 1363 (citing e.g., Alexander v. Virginia, 413 U.S. 836, 93 S. Ct. 2803, 37 L. Ed. 2d 993 (1973)). [**11]

n7 In Penthouse Intern. Ltd. v. McAuliffe, 610 F.2d 1353 (5th Cir.1980), the Court stated:

960 F.2d 134, *138; 1992 U.S. App. LEXIS 9592, **11;
20 Media L. Rep. 1114; 6 Fla. Law W. Fed. C 532

We realize that Judge Freeman, as a member of the community of Fulton County, Georgia, is probably able to determine whether the average person, applying contemporary community standards would find that a work taken as a whole appeals to the prurient interest. But in this case, we must exercise our power of independent review and declare that taken as a whole, 'Penthouse' and 'Oui' appeal to the prurient interest. . . .

. . . .

While we realize that Judge Freeman, as a member of the community, should possess insight as to what the average person of Fulton County, Georgia, applying contemporary community standards would find patently offensive, we must exercise our power of independent review. This is especially important because Judge Freeman may have not examined the question of 'describing sexual conduct.' We therefore conclude that the district court incorrectly determined that 'Penthouse' and 'Oui' do not include patently offensive depictions or descriptions of sexual conduct.

610 F.2d at 1364, 1366. See also United States v. Various Articles of Obscene Merchandise, 709 F.2d 132, 138 (2d Cir.1983) (Meskill, J. concurring in the result) ("On a prior appeal to this Court, a different panel of which I was a member, reversed [District] Judge Sweet's finding of non-obscenity because he had relied upon impermissible indicia of community standards. . . . Today, we affirm. In so doing, the majority accords uncommon deference to Judge Sweet's finding. . . . I am ill equipped to question Judge Sweet's assessment. Moreover, the government failed to introduce any evidence pertaining to community standards to facilitate our review. Had this case originated in the District of Connecticut, a community whose standards are familiar to me, I would not hesitate to reverse; but it did not. I reluctantly concur."). [**12]

n8 Penthouse, 610 F.2d at 1363. See Miller, 413 U.S. at 25, 93 S. Ct. at 2615.

n9 Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499, 104 S. Ct. 1949, 1959, 80 L. Ed. 2d 502, 515 (1983).

n10 Id. 466 U.S. at 501, 104 S. Ct. at 1959.

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In this case, it can be conceded without deciding that the judge's familiarity with contemporary community standards is sufficient to carry the case as to the first two prongs of the Miller test: prurient interest applying community standards and patent offensiveness as defined by Florida law. The record is insufficient, however, for this Court to assume the fact finder's artistic or literary knowledge or skills to satisfy the last prong of the Miller analysis, which requires determination of whether a work "lacks serious artistic, scientific, literary or political value." n11

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n11 Miller, 413 U.S. at 24, 93 S. Ct. at 2615.

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960 F.2d 134, *138; 1992 U.S. App. LEXIS 9592, **12;
20 Media L. Rep. 1114; 6 Fla. Law W. Fed. C 532

[**13]

In Pope v. Illinois, n12 the Court clarified that whether a work possesses serious value was not a question to be decided by contemporary community standards. n13 The Court reasoned that the fundamental principles of the First Amendment prevent the value of a work from being judged solely by the amount of acceptance it has won within a given community:

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n12 481 U.S. 497, 107 S. Ct. 1918, 95 L. Ed. 2d 439 (1987).

n13 Id. 481 U.S. at 500-01, 107 S. Ct. at 1920-21.

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Just as the ideas a work represents need not obtain majority approval to merit protection, neither, insofar as the First Amendment is concerned, does the value of the work vary from community to community based on the degree of local acceptance it has won. n14

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n14 Id. 481 U.S. at 500-01, 107 S. Ct. at 1921.

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[**14]

The Sheriff concedes that he has the burden of proof to show that the recording is obscene. Yet, he submitted no evidence to contradict the testimony that the work had artistic value. A work cannot be held obscene [*139] unless each element of the Miller test has been met. We reject the argument that simply by listening to this musical work, the judge could determine that it had no serious artistic value.

REVERSED.

2ND CASE of Level 1 printed in FULL format.

RABBI ABRAHAM GROSSBAUM and LUBAVITCH of INDIANA, INC., Plaintiffs-Appellants, v. INDIANAPOLIS-MARION COUNTY BUILDING AUTHORITY and RONALD L. REINKING, in his Capacity as General Manager, Defendants-Appellees.

CITES/QUOTES L. REU ART. ON PAGE 14

No. 95-3976

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

100 F.3d 1287; 1996 U.S. App. LEXIS 30216

September 6, 1996, Argued
November 20, 1996, Decided

SUBSEQUENT HISTORY: [**1] Certiorari Denied May 19, 1997, Reported at: 1997 U.S. LEXIS 3126.

PRIOR HISTORY: Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. 94 C 1801. David F. Hamilton, Judge.

DISPOSITION: AFFIRMED.

COUNSEL: For ABRAHAM GROSSBAUM, Rabbi, LUBAVITCH OF INDIANA, INCORPORATED, Plaintiffs - Appellants: Nathan Lewin, Niki Kuckes, David S. Cohen, MILLER, CASSIDY, LARROCA & LEWIN, Washington, DC USA. B. Keith Shake, HENDERSON, DAILY, WITHROW & DEVOE, Indianapolis, IN USA.

For INDIANAPOLIS-MARION COUNTY BUILDING AUTHORITY, RONALD L. REINKING, in his capacity as General Manager, Defendants - Appellees: Thomas J. Costakis, KRIEG, DEVAULT, ALEXANDER & CAPEHART, Indianapolis, IN USA.

JUDGES: Before CUMMINGS, BAUER, and KANNE, Circuit Judges.

OPINIONBY: KANNE

OPINION: [*1290] KANNE, Circuit Judge. This case presents the issue of what role a government body's motive plays in constitutional analysis when that body tries to regulate speech in a nonpublic forum. The Indianapolis-Marion County Building Authority amended its rules and regulations to prohibit private groups and individuals from exhibiting displays in the lobby of its City-County Building. This rule prevented the plaintiffs from displaying a menorah in the lobby as they had done for eight years [**2] between 1985 and 1992. The plaintiffs sought a preliminary injunction against the new rule so they could again display their menorah. The plaintiffs contended that even though the rule is viewpoint-neutral, its adoption was motivated by an unconstitutional desire to retaliate against the plaintiffs for previous litigation and to discriminate against their religious viewpoint. The District Court denied the motion for the preliminary injunction. Because we hold that the motive of a government body is irrelevant when it enacts a content-neutral rule that regulates speech in a nonpublic forum, we affirm.

I. HISTORY

This is the second time that this case has come before us. See Grossbaum v. Indianapolis-Marion County Building Authority, 63 F.3d 581 (7th Cir. 1995) (Grossbaum I). In the previous appeal, Rabbi Grossbaum and Lubavitch of Indiana, Inc. n1 ("Lubavitch") successfully challenged a policy of the Indianapolis-Marion County Building Authority ("Building Authority") that prohibited religious displays and symbols (such as the plaintiffs' menorah) in the lobby of the City-County Building n2 in Indianapolis. We held that "the prohibition of the menorah's message because of [**3] its religious perspective was unconstitutional under the First Amendment's Free Speech Clause." Grossbaum I, 63 F.3d at 592. This second appeal now challenges a new Building Authority policy that prohibits all private displays, religious or otherwise.

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n1 Lubavitch is "an organization of Hasidic Jews who follow the teachings of a particular Jewish leader, the Lubavitch Rebbe. The Lubavitch movement is a branch of Hasidism, which itself is a branch of orthodox Judaism." County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 587 n.35, 106 L. Ed. 2d 472, 109 S. Ct. 3086 (1989) (citations omitted).

n2 The City-County Building in downtown Indianapolis is the seat of government for the City of Indianapolis and the County of Marion, Indiana. The defendant Building Authority is a municipal corporation that administers the building.

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From 1985 to 1992, Rabbi Grossbaum displayed a five foot high, wooden menorah each year in the City-County Building lobby. In 1993, however, the Indiana Civil Liberties Union [**4] ("ICLU") and the Jewish Community Relations Council ("JCRC") both asked the Building Authority to change its policy. The ICLU argued that religious displays in a nonpublic forum violated the Establishment Clause and that the Building Authority should therefore designate the lobby as a "public forum" to make it clear that all groups would have access to the lobby. The JCRC, meanwhile, wrote a letter to the Building Authority asking that all religious displays be banned so that groups such as the Ku Klux Klan could not use the menorah's presence as an argument for letting in their religious displays.

Expressing concern about losing control over the lobby if it became a public forum, the Building Authority Board of Directors in late 1993 banned all religious displays, thus simultaneously satisfying the JCRC and mooting the ICLU's Establishment Clause complaint. Lubavitch, however, sought a preliminary injunction against the policy, alleging that it was an unconstitutional exclusion of speech protected by the First Amendment. As mentioned above, this court agreed and granted Lubavitch injunctive relief. 63 F.3d at 582.

After our August 1995 decision, however, the Building Authority Board [**5] again modified [*1291] its lobby display policy. At its October 2, 1995 meeting, the Board amended Rule 13 of its "Rules and Regulations Governing The CityCounty Building and Grounds" to read, in part:

No displays, signs or other structures shall be erected in the common areas by any non-governmental, private group or individual since such objects may

interfere with unobstructed and safe ingress and egress by employees of the governmental tenants and by the general public conducting business with government offices and courts in the City-County Building.

On November 29, 1995, Lubavitch amended its original complaint and again sought a preliminary injunction to allow the display of its menorah. Although Rule 13 is content-neutral, Lubavitch claimed that the Board enacted the new rule with an unconstitutional intent. More specifically, Lubavitch alleged two counts under 42 U.S.C. @ 1983: 1) that the Board intended to retaliate against Lubavitch for exercising its right to seek judicial relief and its right to speak in the City-County Building lobby, and 2) that the Board intended to perpetuate the viewpoint discrimination that the Board had earlier attempted when it banned all religious [**6] displays in the lobby.

Lubavitch offered three general categories of evidence to support its claims of unconstitutional motive. First, Lubavitch claimed that the Building Authority enacted Rule 13 in a surreptitious manner. Rule 13 was adopted less than two months after this court's decision in favor of Lubavitch, and the only public notice that the Board might change Rule 13 at its October 1995 meeting was a vague agenda item referring to "Policies on Use of Common Areas." The Building Authority responded, however, that it had at all times followed Indiana's Open Door Law procedures. Second, Lubavitch disputed the Board's justification for the new Rule 13. According to the Board's minutes, the Board banned private displays to assure the free flow of pedestrian traffic in the lobby. The minutes also state that lobby congestion was a particular concern of the Board after it had approved new security measures (such as metal detectors in the lobby) in June 1995. Lubavitch, however, argued that there was no history of displays disrupting lobby traffic that would justify banning all private displays. Third, Lubavitch cited deposition testimony by Board members that it was the Board's intent [**7] to ban religious displays. The Building Authority countered that the testimony was taken out of context in that the admission of a desire to ban religious displays was merely a logical implication of the Board's broader desire to ban all private displays.

The District Court denied Lubavitch's motion for a preliminary injunction, finding that the plaintiffs had not shown a reasonable likelihood of prevailing on either their retaliation or their viewpoint discrimination claim. 909 F. Supp. 1187, 1211 (S.D. Ind. 1995). The court held that although the new Rule 13 was a response to Lubavitch's prior litigation, the rule "remedied the constitutional violation and was not motivated by any desire to punish plaintiffs or to get even with them for filing suit." Id. Similarly, the court found that the Board's decision was not "a mask for a desire to prohibit the expression of these plaintiffs' or others' religious beliefs." Id. Because the balance of harms to the parties was not lopsided, the District Court therefore denied the preliminary injunction. Lubavitch appealed pursuant to 28 U.S.C. @ 1292(a)(1), which gives us jurisdiction to review interlocutory orders that deny injunctive [**8] relief.

II. ANALYSIS

A. Standard of Review

In considering a motion for a preliminary injunction, a district court must first determine whether the moving party has demonstrated 1) some likelihood of prevailing on the merits, and 2) an inadequate remedy at law and irreparable

harm if preliminary relief is denied. If the movant demonstrates both, the court must then consider 3) the irreparable harm the nonmovant will suffer if preliminary relief is granted, balanced against the irreparable harm to the movant if relief is denied; and 4) the public interest, meaning the effect that granting or denying the injunction will have on nonparties. Erickson [*1292] v. Trinity Theatre, Inc., 13 F.3d 1061, 1067 (7th Cir. 1994).

When we review a trial court's grant or denial of a preliminary injunction, we subject findings of fact to clear error review, Fed. R. Civ. P. 52(a); we review a trial court's discretionary balancing of factors under an abuse of discretion standard, Gould v. Lambert Excavating, Inc., 870 F.2d 1214, 1217 (7th Cir. 1989); and we review a trial court's legal conclusions de novo, West Allis Memorial Hosp., Inc. v. Bowen, 852 F.2d 251 (7th Cir. 1988).

B. [**9] The Role of Motive in Constitutional Doctrine

Before addressing Lubavitch's specific claims of retaliation and viewpoint discrimination, a few words are appropriate to consider exactly when and why the motives of government actors are relevant in constitutional analysis. Both parties in this case seem to assume that if the Building Authority Board was motivated by an intent to retaliate against Lubavitch or to discriminate against religious viewpoints then ipso facto the Board violated the Constitution. This leap from nefarious motive to constitutional violation, however, is by no means an automatic one under constitutional case law.

Motive is, of course, relevant to a number of constitutional claims. In Equal Protection Clause analysis, for example, courts often must inquire into the motives of legislators or other government actors. n3 See, e.g., Miller v. Johnson, 132 L. Ed. 2d 762, 115 S. Ct. 2475, 2488 (1995) (voting district violates Constitution if race was "the predominant factor motivating the legislature's decision to place a significant number of voters within or without" the district); Batson v. Kentucky, 476 U.S. 79, 93, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986) (prosecutor's peremptory challenges are unconstitutional [**10] if based solely on purposeful racial discrimination). Similarly, cases under the Establishment Clause or the Bill of Attainder Clauses n4 may require courts to query the subjective intentions of legislators for possible illicit motives. See, e.g., Edwards v. Aguillard, 482 U.S. 578, 585, 96 L. Ed. 2d 510, 107 S. Ct. 2573 (1987) (legislature's "actual purpose" to promote religion invalidates statute); United States v. Lovett, 328 U.S. 303, 313-14, 90 L. Ed. 1252, 66 S. Ct. 1073 (1946) (circumstances of bill's passage showed that its purpose was to punish particular individuals).

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n3 Although courts are often loose in their phraseology, the inquiry that courts occasionally make into the subjective "intent," "motive," or "actual purpose" of government actors should not be confused with the inquiry courts always must make in Equal Protection Clause cases to determine whether a classification advances any legitimate government "purpose," "interest," or "end". The former inquiry requires courts to examine whether the actual thoughts of government officials were constitutionally pure. In Justice Cardozo's words, it requires judges to "psychoanalyze" legislators. See United States v. Constantine, 296 U.S. 287, 299, 80 L. Ed. 233, 56 S. Ct. 223 (1935) (Cardozo, J., dissenting). The latter inquiry, however, requires courts to consider only whether "any state of facts reasonably may be conceived to justify" the

classification. McGowan v. Maryland, 366 U.S. 420, 426, 6 L. Ed. 2d 393, 81 S. Ct. 1101 (1961); see also Alexander M. Bickel, The Least Dangerous Branch 209 (1962) ("[A] determination of 'purpose' . . . is either the name given to the Court's objective assessment of the effect of a statute or a conclusionary term denoting the Court's independent judgment of the constitutionally allowable end that the legislature could have had in view.").

The subjective motivations of government actors should also not be confused with what the Supreme Court recently referred to, in a Free Exercise Clause case, as the "object" of a law. See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 113 S. Ct. 2217, 2227, 124 L. Ed. 2d 472 (1993). The Court there determined that three ordinances impermissibly "had as their object the suppression of religion." Id. at 2231. The Court made this determination by analyzing both the text and the effect in "real operation" of the ordinances. Id. at 2226-31. The Court did not, however, analyze the motive behind the ordinances. Justice Kennedy's investigation into motive (in Part IIA-2 of his opinion) was joined by only Justice Stevens. [**11]

n4 Article I, @ 9, cl. 3 of the U.S. Constitution provides: "No Bill of Attainder or ex post facto Law shall be passed." Article I, @ 10, cl. 1 provides: "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . ."

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The relevance of motive in these instances of constitutional adjudication does not, however, allow the inductive conclusion that a [*1293] universal, all-purpose cause of action exists whenever a plaintiff can allege an unconstitutional motive.

In a Free Speech Clause case, for example, the Supreme Court went so far as to say that "it is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." United States v. O'Brien, 391 U.S. 367, 383, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968). Although that statement may be hyperbole, one constitutional commentator has concluded that, rather than focusing on motive, "most descriptive analyses of First Amendment law, as well as most normative discussions . . . have considered the permissibility of governmental [**12] regulation of speech by focusing on the effects of a given regulation." Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 U. Chi. L. Rev. 413, 413 (1996); cf. McCray v. United States, 195 U.S. 27, 56, 49 L. Ed. 78, 24 S. Ct. 769 (1904) ("The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted.").

Even in the Equal Protection Clause context, the Supreme Court has occasionally been reluctant to question legislative and administrative motive. In Palmer v. Thompson, 403 U.S. 217, 29 L. Ed. 2d 438, 91 S. Ct. 1940 (1971), the City of Jackson, Mississippi had decided to close its public swimming pools rather than desegregate them under court order. The Supreme Court, faced with facts obviously analogous to the case we now consider, explicitly declined to inquire into the city council's motives for closing the pools. Id. at 224-26. The Court upheld the closings because the petitioners had shown "no state

action affecting blacks differently from whites." Id. at 225.

A number of factors explain this [**13] reluctance to probe the motives of legislators and administrators. For starters, the text of the Constitution prohibits many government actions but makes no mention of governmental mentes reae (i.e., guilty minds). The First Amendment, for example, forbids Congress and (through the Fourteenth Amendment's Due Process Clause) the States from making laws "abridging the freedom of speech"--a far different proposition than prohibiting the intent to abridge such freedom. "We are governed by laws, not by the intentions of legislators." Conroy v. Aniskoff, 507 U.S. 511, 113 S. Ct. 1562, 1567, 123 L. Ed. 2d 229 (1993) (Scalia, J., concurring in judgment). Just as we would never uphold a law with unconstitutional effect because its enactors were benignly motivated, an illicit intent behind an otherwise valid government action indicates nothing more than a failed attempt to violate the Constitution. See Church of the Lukumi Babalu Aye, 113 S. Ct. at 2240 (Scalia, J., concurring in part and concurring in judgment); see also Laurence H. Tribe, The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice, 1993 Sup. Ct. Rev. 1, 23.

Beyond these theoretical objections [**14] to investigating motive, practical considerations also suggest caution. Government actions may be taken for a multiplicity of reasons, and any number of people may be involved in authorizing the action. Doubting the propriety of judicial searches for corrupt motives, Chief Justice Marshall thus asked:

> Must it be direct corruption, or would interest or undue influence of any kind be sufficient? Must the vitiating cause operate on a majority, or on what number of the members? Would the act be null, whatever might be the wish of the nation, or would its obligation or nullity depend upon the public sentiment?

Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 130, 3 L. Ed. 162 (1810). Moreover, once a court finds an illicit motive, may the legislature or administrative body ever take the same action again without the imputation of improper intent? The Court in O'Brien declined to strike down a law allegedly tainted by improper motive in part because Congress could then reenact the law "in its exact form if the same or another legislator made a 'wiser' speech about it." 391 U.S. at 384; see [*1294] generally John Hart Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. [**15] 1205, 1212-17 (1970).

In short, the relevance of motive to constitutional adjudication varies by context. No automatic cause of action exists whenever allegations of unconstitutional intent can be made, but courts will investigate motive when precedent, text, and prudential considerations suggest it necessary in order to give full effect to the constitutional provision at issue.

C. Lubavitch's Retaliation Claim

Turning now to the plaintiffs' specific claims, Lubavitch first alleges that the Building Authority's adoption of Rule 13 was in retaliation for plaintiffs' exercise of their free speech rights and for their exercise of their right to petition the courts for redress of grievances. Lubavitch undoubtedly has such rights. n5 Whether Lubavitch also has a legitimate cause of action for retaliation, however, is another matter.

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n5 Lubavitch presumably is referring to its rights under the Free Speech Clause and the Petition Clause. The Petition Clause of the First Amendment prohibits Congress from making any law "abridging . . . the right of the people . . . to petition the Government for a redress of grievances." The Supreme Court has held that this right to petition includes the right of access to the courts. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972). The Court has also held that both the Free Speech Clause and the Petition Clause apply to the States through the Fourteenth Amendment's Due Process Clause. See Gitlow v. New York, 268 U.S. 652, 666, 69 L. Ed. 1138, 45 S. Ct. 625 (1925); Edwards v. South Carolina, 372 U.S. 229, 235, 9 L. Ed. 2d 697, 83 S. Ct. 680 (1963).

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[**16]

The plaintiffs cite numerous cases for the general proposition that "an act in retaliation for the exercise of a constitutionally protected right is actionable under Section 1983 even if the act, when taken for different reasons, would have been proper." Howland v. Kilquist, 833 F.2d 639, 644 (7th Cir. 1987). Indeed, there seems to have been an assumption in this litigation that Lubavitch would win if it could show that the Building Authority enacted Rule 13 out of a desire to punish Lubavitch for the exercise of its constitutional rights.

Claims of retaliation admittedly almost always turn on the issue of motive. See, e.g., Perry v. Sindermann, 408 U.S. 593, 598, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972) (holding that a public employee must show "the decision not to renew his contract was, in fact, made in retaliation for his exercise of the constitutional right of free speech"). An examination of the cases cited in the briefs, however, indicates that both parties fundamentally misconceive the nature of retaliation claims. The broad, sweeping language cited by the parties is belied by the facts of the cases themselves. Indeed, to allow a retaliation cause of action against the Building Authority in this case [**17] would be a huge and unwarranted extension of established retaliation doctrine.

Of the 21 cases cited in the briefs and referenced in the District Court's opinion regarding the proper standard for retaliation claims, 16 were claims brought by either public employees or prisoners. n6 Those numbers alone should have suggested caution when considering Lubavitch's atypical retaliation claim. More tellingly, however, all of the cases cited involved challenges to discretionary government actions taken vis-a-vis individual citizens. None of these cases involved [*1295] a challenge to the mere adoption of a rule, let alone a prospective and generally applicable rule like the Building Authority's Rule 13.

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n6 Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 76 L. Ed. 2d 277, 103 S. Ct. 2161 (1983); Board of Education v. Pico, 457 U.S. 853, 73 L. Ed. 2d 435, 102 S. Ct. 2799 (1982); Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977); Johnson v. University of Wisconsin-Eau Claire, 70 F.3d 469 (7th Cir. 1995); Hale v. Townley, 19 F.3d 1068 (5th Cir. 1994); Gagliardi v. Village of Pawling, 18 F.3d 188 (2d Cir. 1994); Cromley v. Board of Education, 17 F.3d 1059 (7th Cir.

1994); Gooden v. Neal, 17 F.3d 925 (7th Cir. 1994); Brookins v. Kolb, 990 F.2d 308 (7th Cir. 1993); Holland v. Jefferson Nat'l Life Ins. Co., 883 F.2d 1307 (7th Cir. 1989); Rakovich v. Wade, 850 F.2d 1180 (7th Cir. 1988) (en banc); Harris v. Fleming, 839 F.2d 1232 (7th Cir. 1988); Howland v. Kilquist, 833 F.2d 639 (7th Cir. 1987); Button v. Harden, 814 F.2d 382 (7th Cir. 1987); Harvey v. Merit Systems Protection Bd., 256 U.S. App. D.C. 6, 802 F.2d 537 (D.C. Cir. 1986); Perry v. Larson, 794 F.2d 279 (7th Cir. 1986); Knapp v. Whitaker, 757 F.2d 827 (7th Cir. 1985); Matzker v. Herr, 748 F.2d 1142 (7th Cir. 1984); Egger v. Phillips, 710 F.2d 292 (7th Cir. 1983); Buise v. Hudkins, 584 F.2d 223 (7th Cir. 1978); Burton v. Kuchel, 865 F. Supp. 456 (N.D. Ill. 1994).

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Indeed, retaliation case law demonstrates that retaliation causes of action are challenges to the application of governmental rules, not to the rules themselves. Consider a typical retaliation case. A public employee will claim that she was denied a promotion because she has exercised some right, say affiliating with a certain political party. The government employer typically responds that the employee failed to get the promotion not because of her politics but because of some independent, neutral rule (e.g., she was less qualified than other applicants). The employee never disputes that the independent reason is a valid criterion. Rather, the employee will allege only that the rule is being applied arbitrarily or unequally to her.

Retaliation claims are undoubtedly vital to constitutional law. No matter how constitutionally sound a given rule may be, the repeated misapplication or selective application of the rule could create an entirely unconstitutional policy. An official hiring policy that disregards political affiliation, for example, could be no different in its objective, discernible effect than a policy of hiring only Democrats if the official policy is misapplied or ignored.

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Nonetheless, courts will not sustain a retaliation claim where a plaintiff challenges only the enactment of a prospective, generally applicable rule. Executive and legislative branches of government must not be paralyzed by the prospect of a retaliation claim (and the attendant factbased motive inquiry n7) whenever they make new policy that is arguably in response to someone's speech or lawsuit. Suppose, for example, that a group of drug addicts successfully sues to get disability benefits for their addiction and Congress subsequently amends the law to prohibit benefits to drug addicts. No one would reasonably suggest that Congress's motives would then be subject to a retaliation inquiry just because it acted in response to the addicts' success in the courts.

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n7 Pretext and motive are almost automatically relevant in retaliation cases because courts cannot easily determine whether the government is applying its rules equally and fairly. Because cases come before courts one at a time, the details of any particular case may obscure a covert pattern of discrimination against those exercising certain constitutional rights. The only indicator a judge may have of what policy was really being followed may be the motives of the government actors. Motive is relevant not because government officials' thoughts have any constitutionally cognizable psychokinetic effect on constitutional rights, but rather because those thoughts are the best

indicator to the courts of what policy the government is actually putting into effect. Cf. Kagan, supra, at 457 (discussing how courts cannot easily determine, in the context of administrative action, when a content-based decision has occurred).

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Plaintiffs can, of course, attack the substance of a rule as being facially unconstitutional. See, e.g., Saia v. New York, 334 U.S. 558, 559-60, 92 L. Ed. 1574, 68 S. Ct. 1148 (1948) (striking down ordinance giving unfettered discretion to local officials regarding speaker permits); United Pub. Workers v. Mitchell, 330 U.S. 75, 100, 91 L. Ed. 754, 67 S. Ct. 556 (1947) (Congress may not "enact a regulation providing that no Republican . . . shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work"). And government officials cannot escape a retaliation claim simply by dressing up individualized government action to look like a general rule. A policy that prohibited all lobby displays by groups that had put up displays during the previous December, for example, would be neither prospective nor generally applicable. Plaintiffs may not, however, use a retaliation claim to challenge a truly prospective and generally applicable rule that is even-handedly enforced.

In short, retaliation claims protect constitutional rights only against their unequal infringement. We recognized as much in Vukadinovich v. Bartels, 853 F.2d 1387 (7th Cir. 1988), where a teacher brought both [**21] retaliation and equal protection claims after he was dismissed, allegedly for statements he had made to a local newspaper. After disposing of the retaliation claim, we said his equal protection claim alleged "only that he was treated differently because he exercised his right to free speech" and thus was "a mere rewording of plaintiff's First Amendment-retaliation claim." [*1296] Id. at 1391-92; see also Thompson v. City of Starkville, Miss., 901 F.2d 456, 468 (5th Cir. 1990) (dismissing plaintiff's equal protection claim in retaliation case because it "amounted to no more than a restatement of his first amendment claim"). In other words, retaliation doctrine protects citizens against those individualized, discretionary government actions where the government's coercive power is greatest, not against government rules that affect both majority and minority alike. n8

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n8 We do not imply, however, that retaliation claims arise under the Equal Protection Clause. That clause does not establish a general right to be free from retaliation. Ratliff v. DeKalb County, Ga., 62 F.3d 338, 341 (11th Cir. 1995); see also Nestor Colon Medina & Sucesores, Inc. v. Custodio, 964 F.2d 32, 43-45 (1st Cir. 1992). We suggest only that the retaliation protection provided by other clauses of the Constitution is limited to claims against the unequal application of discretionary government power.

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Returning to the specifics of this case, Rule 13 is unequivocally a prospective and generally applicable rule because it bans all private displays henceforth. Furthermore, no one has even hinted that the rule has been or is

being applied unequally. Lubavitch therefore has not stated facts sufficient for a retaliation claim. To hold otherwise would be a significant expansion of retaliation doctrine and would encourage only litigiousness and governmental paralysis.

D. Lubavitch's Viewpoint Discrimination Claim

Although its retaliation claim can be dismissed with relative ease, Lubavitch presents a more colorable viewpoint discrimination claim. Here Lubavitch alleges that, regardless of whether the Building Authority wanted to retaliate because of Lubavitch's litigation success, the Building Authority's overarching intent to discriminate against the menorah display (and against religious displays generally) makes Rule 13 an unconstitutional viewpointbased regulation of speech. n9

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n9 Although Lubavitch's viewpoint discrimination claim clearly derives from a long line of Free Speech Clause case law, Lubavitch argues on appeal that amended Rule 13 also violates the Establishment Clause. Lubavitch's general invocation of the First Amendment in its complaint, however, is far too broad to preserve an Establishment Clause claim raised for the first time on appeal. Like the Fourteenth Amendment, the First Amendment is "a vast umbrella, and to preserve a claim under it for consideration by an appellate court you must tell the court just what spot of ground beneath the umbrella you're standing on." Yatvin v. Madison Metro. Sch. Dist., 840 F.2d 412, 420 (7th Cir. 1988).

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Because the City-County Building lobby is government property, the constitutionality of a regulation of speech on that property hinges on what has been called "forum analysis." Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 800, 87 L. Ed. 2d 567, 105 S. Ct. 3439 (1985). Although "nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property," id. at 799-800, any regulation of speech on government property must still withstand some constitutional scrutiny.

The exact constitutional standard depends on whether the government is trying to regulate a "public forum" or a "nonpublic forum." Property can be designated as a public forum either by tradition or by law. Capitol Square Review and Advisory Bd. v. Pinette, 132 L. Ed. 2d 650, 115 S. Ct. 2440, 2446 (1995). Traditional public fora are properties like streets and parks which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983) (quoting [**24] Hague v. Committee for Industrial Organization, 307 U.S. 496, 515, 59 S. Ct. 954, 83 L. Ed. 1423 (1939) (opinion of Roberts, J.)). Legally created public fora are fora such as school board meetings and municipal theaters where the government has intentionally--not by inaction or by permitting limited discourse--opened a nontraditional forum for public discourse. See Cornelius, 473 U.S. at 802; Perry, 460 U.S. at 45-46. [*1297] Any remaining government property is considered a nonpublic forum.

International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678-79, 120 L. Ed. 2d 541, 112 S. Ct. 2701 (1992).

Given their greater importance to the free flow of ideas, public fora receive greater constitutional protection from speech restrictions. Any speech regulation in a public forum must be either 1) a reasonable, content-neutral time, place, and manner restriction, or 2) narrowly drawn to advance a compelling state interest. Capitol Square, 115 S. Ct. at 2446. As Justice Brennan explained in his Perry dissent, content-neutrality is a particularly strong constitutional standard that "prohibits the government from choosing the subjects that are appropriate for public discussion." Perry, 460 U.S. at 59 (Brennan, J., dissenting). [**25] In other words, content-neutrality not only forbids discrimination against particular viewpoints on a subject (what Justice Brennan called "censorship in its purest form," id. at 62), but also prevents the government from even limiting discussion in public fora to specific subjects. A content-neutral regulation is thus both viewpoint-neutral and subject-neutral. See Rosenberger v. Rector and Visitors of the Univ. of Va., 132 L. Ed. 2d 700, 115 S. Ct. 2510, 2517 (1995) ("Discrimination against one set of views or ideas is but a subset or particular instance of the more general phenomenon of content discrimination.").

The constitutional standard governing speech regulations in nonpublic fora is less certain. The Supreme Court has elaborated on the standard in a number of cases, but the Court's language has not always been entirely consistent. The cases have unequivocally held that any speech regulation in a nonpublic forum must be "reasonable in light of the purposes served by the forum." Rosenberger, 115 S. Ct. at 2517; Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384, 113 S. Ct. 2141, 2147, 124 L. Ed. 2d 352 (1993); Cornelius, 473 U.S. at 806; Perry, 460 U.S. at 49; see also Postal Service [**26] v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 131 n.7, 69 L. Ed. 2d 517, 101 S. Ct. 2676 (1981). The cases have been less definitive, however, regarding the neutrality standard that a nonpublic forum speech regulation must meet. In Postal Service v. Council of Greenburgh Civic Ass'ns, the Court said that such speech restrictions must be content-neutral. Id. In Perry and Cornelius, however, the Court shifted its focus to viewpoint discrimination and particularly to the intent to discriminate against specific viewpoints. The Court stated that a regulation must not be "an effort to suppress expression merely because public officials oppose the speaker's view," Perry, 460 U.S. at 46, and similarly that a regulation must not be "in reality a facade for viewpoint-based discrimination," Cornelius, 473 U.S. at 811. In its most recent cases, meanwhile, the Court has said that nonpublic forum regulations must be viewpoint neutral, making no mention of impermissible intent. See Rosenberger, 115 S. Ct. at 2517; Lamb's Chapel, 113 S. Ct. at 2147.

We need not decide whether the City-County Building lobby is a public forum because Lubavitch has conceded for the purposes of its preliminary [**27] injunction motion that the lobby is a nonpublic forum. We must determine, however, the appropriate standard under which to review Rule 13. The Court has clearly abandoned the content neutrality standard, but the relevance of motive in the Court's opinions has varied. We must therefore determine whether the subjective language in Perry and Cornelius (suggesting that the mere intent to discriminate against a viewpoint is sufficient for a constitutional violation) survives the more recent cases that suggest a more objective measure of viewpoint-neutrality.

Whatever the Court's language in recent cases, the Court's actions are both more telling and more binding than any mere dicta. And the motive language in earlier cases cannot be dismissed as mere dicta because the Court in Cornelius remanded the case to determine whether the speech restriction at issue was "impermissibly motivated by a desire to suppress a particular point of view." [*1298] 473 U.S. at 812-13. Nonetheless, we view the present case as distinguishable from these prior precedents because the Court never considered a content-neutral speech restriction like Rule 13. Rather, the Court's concern about motivation arose [**28] only in cases where the Court was considering speech restrictions that explicitly discriminated on the basis of content.

Motive becomes keenly relevant in cases that involve content discrimination because the line between viewpoints and subjects is such an elusive one. Because subject matter discrimination is clearly constitutional in nonpublic fora, see Perry, 460 U.S. at 49, classifying a particular viewpoint as a subject rather than as a viewpoint on a subject will justify discrimination against the viewpoint. This inherent manipulability of the line between subject and viewpoint has forced courts to scrutinize carefully any content-based discrimination. See Airline Pilots Ass'n v. Department of Aviation, 45 F.3d 1144, 1159-60 (7th Cir. 1995) (warning courts against retreating to an exaggerated level of generality when examining content-based regulations). Courts thus have struggled, for example, with the issue of whether religious discussion should be categorized as a subject (and therefore excludable from a nonpublic forum) or as a viewpoint (and therefore constitutionally protected). See Rosenberger, 115 S. Ct. at 2517-18; Grossbaum I, 63 F.3d at 589-92. The [**29] Supreme Court faced a similar issue in Cornelius where it was understandably dubious of the argument that excluding all advocacy groups, regardless of political orientation, from a government charity drive was just subject matter discrimination rather than viewpoint discrimination. 473 U.S. at 811-12. Because the government was distinguishing among groups based on the content of their messages (either advocacy or nonadvocacy), the Court remanded the case to see whether the government was really targeting certain viewpoints.

Where, however, the government enacts a content-neutral speech regulation for a nonpublic forum, there is no concern that the regulation is "in reality a facade for viewpointbased discrimination," Cornelius, 473 U.S. at 811. Whatever the intent of the government actors, all viewpoints will be treated equally because the regulation makes no distinctions based on the communicative nature or impact of the speech. A facade for viewpoint discrimination, in short, requires discrimination behind the facade (i.e., some viewpoint must be disadvantaged relative to other viewpoints). Courts do have a hard call to make when they review content-based speech regulations [**30] because the government could be shutting out some viewpoints by labelling them as subjects. Motive may thus be a vital piece of evidence that courts must use to judge the viewpoint-neutrality of the regulation. When the government restricts speech in a content-neutral fashion, however, all viewpoints--from the Boy Scouts to the Hare Krishnas--receive the exact same treatment. n10

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n10 It should be noted that content-neutrality requires not only facial neutrality but also some semblance of general applicability. Cf. Church of the Lukumi Babalu Aye, 113 S. Ct. at 2226-33 (discussing neutrality and general applicability as the touchstones of Free Exercise Clause analysis); id. at 2239 (Scalia, J., concurring in part and concurring in the judgment); Employment

Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 879-81, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990). A regulation that prohibited all private groups from displaying nine-pronged candelabra may be facially neutral, but it would still be unconstitutionally discriminatory against Jewish displays. The lack of general applicability is obvious not from the government's motives but from the narrowness of the regulation's design and its hugely disproportionate effect on Jewish speech. Cf. Tribe, supra, at 34.

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Indeed, the Supreme Court suggested in Capitol Square that content-neutral regulations are free from motive inquiries even in public forum cases. The Court there considered the denial of a permit to the Ku Klux Klan for the erection of a Latin cross in a public forum, even after the government had granted permission for a Christmas tree and a menorah to be displayed. Eight members of the Court joined behind the proposition that the State of Ohio "could ban all unattended private displays in [the forum] if it so desired." Capitol Square, [*1299] 115 S. Ct. at 2457 (Souter, J., concurring in part and concurring in the judgment); see also id. at 2446; id. at 2467-68 (Stevens, J., dissenting). This proposed course of action would seem impossible, however, if Ohio's undisputed desire to keep the Klan off of government property would be sufficient to establish viewpoint discrimination. And if eight justices thought Ohio was free, even after it had discriminated against the Klan, to ban all private displays in a public forum, then the Building Authority a fortiori should have the same freedom to prohibit all private displays in its nonpublic forum. n11

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n11 Our holding today is expressly limited to speech regulations in nonpublic fora. We express no opinion on the harder issue of whether motive is relevant in public forum cases. The nonpublic forum case is easier because of the stronger government interest in controlling property not dedicated to public discourse, see Perry, 460 U.S. at 49, and because of the lesser role that nonpublic fora generally play in the marketplace of ideas, see Richard A. Posner, Free Speech in an Economic Perspective, 20 Suffolk U. L. Rev. 1, 52 (1986).

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In sum, content-neutral speech regulations in nonpublic fora pass constitutional muster regardless of motive for the same reason that retaliation claims are inoperative against generally applicable rules. When a government body acts at a sufficiently high level of generality, there is no need for courts to search the minds of government actors for invidious motives that might indicate unconstitutional discriminatory effect. And it is this unconstitutional effect that ultimately matters. "[A] facially neutral government action that does not in fact . . . violate anyone's constitutional rights or any constitutional principle . . . should not be rendered unconstitutional, or even suspect, just by virtue of the factors considered by, or the attitudes or intentions held by, the public officials responsible for that action . . . ." Tribe, supra, at 28-29; cf. Kagan, supra, at 505-17.

Moreover, we are mindful of Judge Easterbrook's observation that real world actors such as the Building Authority need ex ante guidance from our decisions, not just ex post judicial critiques:

People are entitled to know the legal rules before they act, and only the most compelling reason [**33] should lead a court to announce an approach under which no one can know where he stands until litigation has been completed. Litigation is costly and introduces risk into any endeavor; we should struggle to eliminate the risk and help people save the costs. Unless some obstacle such as inexperience with the subject, a dearth of facts, or a vacuum in the statute books intervenes, we should be able to attach legal consequences to recurrent factual patterns.

Secretary of Labor v. Lauritzen, 835 F.2d 1529, 1539 (7th Cir. 1987) (Easterbrook, J., concurring). The past year of litigation, the more than 900 pages of depositions fishing for an inculpatory admission by the Building Authority, and the thousands of taxpayer dollars spent on legal expenses for this case only underscore the point. This motive game is not worth the candle.

The only possible issue remaining is whether Rule 13 is reasonable in light of the purposes served by the CityCounty Building lobby. Although Lubavitch did not explicitly challenge Rule 13 on reasonableness grounds separate from its viewpoint discrimination claim, Lubavitch clearly did argue that the unreasonableness of Rule 13 was evidence that the Building [**34] Authority's motives were pretextual. Assuming for the sake of argument that this was sufficient to raise the reasonableness issue, we are confident that the District Court did not abuse its discretion when it denied Lubavitch's motion for a preliminary injunction. "The Government's decision to restrict access to a nonpublic forum need only be reasonable; it need not be the most reasonable or the only reasonable limitation." Cornelius, 473 U.S. at 808. The District Court found a number of reasonable justifications for the new Rule 13, 909 F. Supp. at 1205, 1207, 1209-10, and all are well within the bounds of what rational basis scrutiny permits.

In closing, nothing in this opinion should be construed as undermining Lubavitch's hardfought success in its previous appeal to this court. Lubavitch clearly struck a blow for the freedom of speech when it challenged [*1300] the Building Authority's earlier policy that discriminated against religious displays. Lubavitch's prior victory against the Building Authority does not, however, give Lubavitch immunity against all subsequent Building Authority actions that, although nondiscriminatory, happen to be disadvantageous to Lubavitch.

The decision [**35] of the District Court to deny preliminary injunctive relief is AFFIRMED.

7TH CASE of Level 1 printed in FULL format.

STATE OF NEW JERSEY, PLAINTIFF-RESPONDENT, v. STEVEN D. VAWTER AND DAVID J. KEARNS, DEFENDANTS-APPELLANTS

A-15 September Term 1993

Supreme Court of New Jersey

136 N.J. 56; 642 A.2d 349; 1994 N.J. LEXIS 430; 63 U.S.L.W. 2015

CITES / QUOTES
L. REV ART

p. 65

October 12, 1993, Argued
May 26, 1994, Decided

PRIOR HISTORY: [***1]

On certification to the Superior Court, Law Division, Monmouth County.

COUNSEL: Stephen M. Pascarella argued the cause for appellant David J. Kearns (Allegra, Pascarella & Nebelkopf, attorneys).

John T. Mullaney, Jr., argued the cause for appellant Steven D. Vawter.

Robert A. Honecker, Jr., Second Assistant Prosecutor, argued the cause for respondent (John Kaye, Monmouth County Prosecutor, attorney).

Debra L. Stone, Deputy Attorney General, argued the cause for amicus curiae, Attorney General of New Jersey (Fred DeVesa, Acting Attorney General, attorney).

JUDGES: For reversal and remandment -- Chief Justice Wilentz and Justices Clifford, Handler, Pollock, Garibaldi and Stein. Opposed -- None. The opinion of the Court was delivered by Clifford, J. Stein, J., concurring.

OPINIONBY: CLIFFORD

OPINION: [*61] [**352] Defendants are charged with violations of N.J.S.A. 2C:33-10 (Section 10) and -11 (Section 11), New Jersey's so-called hate-crime statutes. They contend that the statutes are unconstitutional under the First and Fourteenth Amendments to the United States Constitution. The trial court denied defendants' motion to dismiss the indictment, and the Appellate Division granted leave to appeal. We granted defendants' motion for direct certification, 133 N.J. 407, 627 A.2d 1123 (1993). Following, as we must, the United States Supreme Court's decision in R.A.V. v. City of St. Paul, 505 U.S. , 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992), we now declare the cited statutes unconstitutional, and therefore reverse the judgment below.

I

On May 13, 1991, a person or persons spray-painted a Nazi swastika and words appearing to read "Hitler Rules" (the spray-painters misspelled "Hitler") on a synagogue, Congregation B'nai Israel, in the Borough of Rumson. On that same night the same person or persons also spray-painted a satanic pentagram on the driveway of a Roman Catholic church, the Church of the Nativity, in the neighboring Borough of Fair Haven.

In March 1992 the Monmouth County Prosecutor's Office received confidential information from witnesses identifying defendants, Stephen Vawter and David Kearns, as the persons who had spray-painted the synagogue and the driveway of the church. In [*62] due course a Monmouth County grand jury returned a twelve-count indictment against Vawter and Kearns. Counts One through Four charged defendants with having put another in fear of violence by placement of a symbol or graffiti on property, a third-degree offense, in violation of Section 10; Counts Five through Eight charged defendants with fourth-degree defacement contrary to Section 11; Counts Nine and Ten charged defendants with third-degree criminal mischief in violation of N.J.S.A. 2C:17-3; and Counts Eleven and Twelve charged defendants with conspiracy to commit the offenses charged in Counts One through Ten.

Defendants moved to dismiss Counts One through Eight of the indictment on the ground that Sections 10 and 11 violate their First and Fourteenth Amendment rights under the United States Constitution. Section 10 reads as follows:

A person is guilty of a crime of the third degree if he purposely, knowingly or recklessly puts or attempts to put another in fear of bodily violence by placing on public or private property a symbol, an object, a characterization, an appellation or graffiti that exposes another to threats of violence, contempt or hatred on the basis of race, color, creed or religion, including, but not limited to[,] a burning cross or Nazi swastika. A person shall not be guilty of an attempt unless his actions cause a serious and imminent likelihood of causing fear of unlawful bodily violence.

Section 11 provides:

A person is guilty of a crime of the fourth degree if he purposely defaces or damages, without authorization of the owner or tenant, any private premises or property primarily used for religious, educational, residential, memorial, charitable, or cemetery purposes, or for assembly by persons of a particular race, color, creed or religion by placing thereon a symbol, an object, a characterization, an appellation, or graffiti that exposes another to threat of violence, contempt or hatred on the basis of race, color, creed or religion, including, but not limited to, a burning cross or Nazi swastika.

[**353] In denying defendants' motion to dismiss the first eight counts of the indictment the trial court, satisfied that it could distinguish Sections 10 and 11 from the St. Paul ordinance in R.A.V., held Sections 10 and 11 constitutional. On this appeal we address defendants' constitutional challenge to those sections.

[*63] II

Our cases recognize that "[i]n the exercise of police power, a state may enact a statute to promote public health, safety or the general welfare." State, Dep't of Envtl. Protection v. Ventron Corp., 94 N.J. 473, 499, 468 A.2d 150 (1983). The authority of the State to regulate is limited, however; a State may not exercise its police power in a manner "repugnant to the fundamental constitutional rights guaranteed to all citizens." Gundaker Cent. Motors v. Gassert, 23 N.J. 71, 79, 127 A.2d 566 (1956), appeal denied, 354 U.S. 933, 77 S.Ct. 1397, 1 L.Ed.2d 1533 (1957). Here, defendants charge that the statutes under which they were charged offend their fundamental constitutional right to

freedom of speech under the First Amendment.

Sections 10 and 11 do not proscribe speech per se. Rather, they prohibit certain kinds of conduct. Section 10 prohibits the conduct of "put[ting] or attempt[ing] to put another in fear of bodily violence by placing on * * * property a symbol * * * that exposes another to threats of violence, contempt or hatred on the basis of race, color, creed or religion, including, but not limited to[,] a burning cross or Nazi swastika." Section 11 forbids the conduct of "defac[ing] or damag[ing private premises or property] * * * by placing thereon a symbol * * * that exposes another to threats of violence, contempt or hatred on the basis of race, color, creed or religion, including, but not limited to, a burning cross or Nazi swastika."

To decide whether the conduct proscribed by Sections 10 and 11 is "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments," Spence v. Washington, 418 U.S. 405, 409, 94 S.Ct. 2727, 2730, 41 L.Ed.2d 842, 846 (1974), we must determine whether "[a]n intent to convey a particularized message [i]s present" and whether those who view the message have a great likelihood of understanding it. Id. at 410-11, 94 S.Ct. at 2730, 41 L.Ed.2d at 847. The Supreme Court has concluded in a variety of contexts that conduct is sufficiently expressive to fall within the protections of the First [*64] Amendment. See, e.g., Texas v. Johnson, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (holding protected the burning of flag to protest government policies); Spence, supra, 418 U.S. 405, 94 S.Ct. 2727, 41 L.Ed.2d 842 (holding protected the placing of peace symbol on flag to protest invasion of Cambodia and killings at Kent State); Tinker v. Des Moines School District, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) (holding protected the wearing of black armbands to protest war in Vietnam).

In R.A.V., supra, 505 U.S. , 112 S.Ct. 2538, 120 L.Ed.2d 305, the United States Supreme Court determined that a St. Paul, Minnesota, Bias-Motivated Crime Ordinance proscribed expressive conduct protected by the First Amendment. The ordinance read:

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

[St. Paul, Minn. Legis. Code @ 292.02 (1990).]

As one court has noted, "While the [R.A.V.] Court did not explicitly state that * * * acts prohibited by the [St. Paul ordinance] are expression cognizable by the First Amendment, such a conclusion necessarily precedes the Court's holding that the [ordinance] facially violate[s] the First Amendment." State v. Sheldon, 332 Md. 45, 629 A.2d 753, 757 (1993).

Taking the lead from the Supreme Court, States with similar hate-crime statutes have determined also that the conduct proscribed by their statutes constitutes protected expression. [**354] For example, the Court of Appeals of Maryland found that the conduct prohibited by its statute, "burn[ing] or caus[ing] to be burned any cross or other religious symbol upon any private or public property," Md.Code Ann., Crim. Law Art. 27, @ 10A, qualifies as speech for purposes of the First Amendment. Sheldon, supra, 629 A.2d at 757. The

Maryland court reasoned that "[b]ecause of the[] well known and painfully apparent connotations of burning religious symbols, there can be no doubt that those who engage in [*65] such conduct intend to 'convey a particularized message,' or that those who witness the conduct will receive the message." Ibid.

Similarly, in State v. Talley, 122 Wash.2d 192, 858 P.2d 217, 230 (1993), the Supreme Court of Washington concluded that part of its hate-crime statute regulates speech for purposes of the First Amendment. That part of the Washington statute reads: "The following constitute per se violations of th[e malicious harassment statute]: (a) Cross burning; or (b) Defacement of the property of the victim or a third person with symbols or words when the symbols or words historically or traditionally connote hatred or threats toward the victim." Wash. Rev.Code @ 9A.36.080(2). The Washington court declared that the statute "clearly regulates protected symbolic speech * * *." Talley, supra, 858 P.2d at 230. See also State v. Ramsey, 430 S.E.2d 511, 514 (S.C.1993) (finding that statute prohibiting placement of burning or flaming cross on public property or on private property without owner's permission regulates protected symbolic conduct).

Not all statutes dealing with hate crimes, however, necessarily regulate speech for purposes of the First Amendment. Although enactments like the St. Paul ordinance and the Maryland and Washington statutes have been viewed as regulating expression protected by the First Amendment, courts have found that victim-selection or penalty-enhancement statutes target mere conduct and do not restrict expression. Those statutes punish bias in the motivation for a crime by enhancing the penalty for that crime. See, e.g., Wisconsin v. Mitchell, 508 U.S. , , 113 S.Ct. 2194, 2201, 124 L.Ed.2d 436, 447 (1993) (finding that statute increasing penalty for selecting target of crime based on race, religion, color, disability, sexual orientation, national origin, or ancestry of person "is aimed at conduct unprotected by the First Amendment"); People v. Miccio, 155 Misc.2d 697, 589 N.Y.S.2d 762, 764-65 (Crim.Ct.1992) (finding that statute that elevates crime of simple harassment to crime of aggravated harassment when bias motive is present targets only conduct); State v. Plowman, 314 Or. 157, 838 P.2d 558, 564-65 (1992), (finding that [*66] statute that elevates crime of assault from misdemeanor to felony when defendant acts because of perception of victim's race, color, religion, national origin, or sexual orientation is directed against conduct), cert. denied, U.S. , 113 S.Ct. 2967, 125 L.Ed.2d 666 (1993); Tally, supra, 858 P.2d at 222 (finding that Wash.Rev. Code @ 9A.36.080(1), which "enhances punishment for [criminal] conduct where the defendant chooses his or her victim because of [the victim's] perceived membership in a protected category," is aimed at conduct). We are satisfied, however, that Sections 10 and 11 are more similar to the former category of statute than to the latter. Sections 10 and 11 do not increase the penalty for an underlying offense because of a motive grounded in bias; rather, those sections make criminal the expressions of hate themselves.

We therefore conclude that Sections 10 and 11 regulate expression protected by the First Amendment. When a person places a Nazi swastika on a synagogue or burns a cross in an African-American family's yard, the message sought to be conveyed is clear: by painting the swastika or by burning the cross, a person intends to express hatred, hostility, and animosity toward Jews or toward African-Americans. "There are certain symbols * * * that in the context of history carry a clear message of racial supremacy, hatred, persecution, and degradation of certain groups." Mari J. Matsuda, Public Response to Racist

Speech: Considering the Victim's Story, 87 Mich.L.Rev. 2320, 2365 (1989). Such messages are not only offensive and contemptible, they are all too easily understood. In fact, the sort of conduct [**355] regulated by Sections 10 and 11 is a successful, albeit a reprehensible, vehicle for communication: "Victims of vicious hate propaganda have experienced physiological symptoms and emotional distress ranging from fear in the gut, rapid pulse rate and difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis and suicide." Id. at 2336. Thus, Sections 10 and 11 meet the requirements of Spence, supra, 418 U.S. 405, 94 S.Ct. 2727, 41 L.Ed.2d 842, in that they address conduct that is heavily laden with an unmistakable message. Those sections therefore regulate speech for purposes of the First Amendment.

[*67] In concluding that the statutes regulate protected expression, we reject the argument of the Attorney General and of the trial court that because Sections 10 and 11 "require a specific intent to threaten harm against another because of [ ] race," State v. Davidson, 225 N.J.Super. 1, 14, 541 A.2d 700 (App.Div.1988), those statutes regulate only conduct. In State v. Finance American Corp., 182 N.J.Super. 33, 38, 440 A.2d 28 (1981), the Appellate Division found that because N.J.S.A. 2C:33-4, the harassment statute, requires the speaker to have the specific intent to harass the listener, the statute regulates conduct. Sections 10 and 11, however, do more than add a specific intent requirement. As we have noted, the statutes regulate expression itself. Thus, we must analyze Sections 10 and 11 under the appropriate level of First Amendment scrutiny.

III

The Supreme Court has observed that although governments have a "freer hand" in regulating expressive conduct than in regulating pure speech, they may not "proscribe particular conduct because it has expressive elements." Johnson, supra, 491 U.S. at 406, 109 S.Ct. at 2540, 105 L.Ed.2d at 354-55. "'A law directed at the communicative nature of conduct must * * * be justified by the substantial showing of need that the First Amendment requires.'" Id. at 406, 109 S.Ct. at 2540, 105 L.Ed.2d at 355 (quoting Community for Creative Non-Violence v. Watt, 703 F.2d 586, 622-23 (D.C.Cir.1983) (Scalia, J., dissenting)).

If "'the governmental interest [behind Sections 10 and 11] is unrelated to the suppression of free expression,'" id. at 407, 109 S.Ct. at 2540, 105 L.Ed.2d at 355 (quoting United States v. O'Brien, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672, 680 (1968)), the First Amendment requires that the regulation meet only the lenient O'Brien test. Under that test,

a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free [*68] expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

[O'Brien, supra, 391 U.S. at 377, 88 S.Ct. at 1679, 20 L.Ed.2d at 680.]

If Sections 10 and 11 relate to the suppression of free expression, we must decide if the statutes are content neutral or content based to determine the level of scrutiny that we should apply under the First Amendment. "The

principal inquiry in determining content-neutrality * * * is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S.Ct. 2746, 2754, 105 L.Ed.2d 661, 675 (1989). If a regulation is content neutral, "reasonable time, place, or manner restrictions" are appropriate. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221, 227 (1984). Time, place, or manner regulations are reasonable if they are "narrowly tailored to serve a significant governmental interest, and [] they leave open ample alternative channels for communication * * *." Ibid.

If, however, we decide that Sections 10 and 11 relate to the suppression of free expression and that they are content based, the strictest judicial scrutiny is warranted: "Content-based statutes are presumptively invalid." R.A.V., supra, 505 U.S. at , 112 S.Ct. at 2542, 120 L.Ed.2d at 317. To survive strict scrutiny, a regulation must be [**356] "necessary to serve a compelling state interest and [it must be] narrowly drawn to achieve that end." Perry Educ. Ass'n v. Perry Local Educ. Ass'n, 460 U.S. 37, 45, 103 S.Ct. 948, 955, 74 L.Ed.2d 794, 804 (1983).

We conclude that Sections 10 and 11 are content-based restrictions. In adopting those sections the Legislature was obviously expressing its disagreement with the message conveyed by the conduct that the statutes regulate. The State argues that the statutes are "directed primarily against conduct" and that they only "incidentally sweep up" speech. Although the legislative history is not instructive, other factors persuade us that the State's characterization of Sections 10 and 11 is incorrect.

[*69] First, New Jersey had statutes proscribing the same conduct as Sections 10 and 11 before the enactment of those sections in 1981. Section 10 deals with "placing on public or private property a symbol, an object, a characterization, an appellation or graffiti * * *." Section 11 deals with "defac[ing] or damag[ing] * * * private premises or property * * *." Yet, other statutes proscribe exactly the same conduct: first, the criminal-mischief statute, N.J.S.A. 2C:17-3, prohibits damaging or tampering with the tangible property of another (the State charged defendants, Vawter and Kearns, under that statute in addition to Sections 10 and 11); second, the criminal-trespass statute, N.J.S.A. 2C:18-3, forbids entering or remaining in any structure that one knows one is not licensed or privileged to enter; and finally -- if the offense is cross burning and if the conditions of the incident are appropriate -- the arson statute, N.J.S.A. 2C:17-1, criminalizes starting a fire, thereby putting another person in danger of death or bodily injury or thereby placing a building or structure in danger of damage or destruction. Thus, the Legislature enacted Sections 10 and 11 specifically to condemn the expression of biased messages. Even in the absence of those statutes the State could have continued to punish the conduct of painting racially- or religiously-offensive graffiti or of burning a cross under then-existing laws.

Second, the statements of Governor Byrne, who signed Sections 10 and 11 into law, and the circumstances surrounding the signing support a finding that the Legislature adopted Sections 10 and 11 to denounce racially- or religiously-biased messages. As the Governor declared in his conditional veto, for technical reasons, of an earlier version of the statutes:
Our democratic society must not allow intimidation of racial, ethnic or religious groups by those who would use violence or would unlawfully vent

their hatred. All members of racial, ethnic or religious groups must be able to participate in our society in freedom and with a full sense of security. This is what distinguishes America. And this is what this bill preserves.

[Governor's Veto Message to Assembly Bill No. 334 (June 15, 1981).]

By that statement, the Governor declared his, and the general, understanding that the Legislature's purpose was to announce its disagreement with the expression of biased messages. Moreover, [*70] on September 10, 1981, Governor Byrne signed the statutes into law at Congregation B'nai Yeshrun in Teaneck, a synagogue that had been defaced with swastikas and obscenities in October 1979. That special signing ceremony (at which the Governor and the sponsors of the legislation, Assemblyman Baer and Senator Feldman, spoke) demonstrates also that the statutes were aimed specifically at denouncing messages of hatred. Thus, we conclude that the Governor and the Legislature, by enacting Sections 10 and 11, intended to regulate expressions of racial and religious hatred.

The intent and purpose behind the statutes could hardly be more laudable. And yet the unmistakable fulfillment of that purpose is what renders Sections 10 and 11 content-based restrictions. As the Supreme Court emphasized in Ward, supra, 491 U.S. at 791, 109 S.Ct. at 2754, 105 L.Ed.2d at 675, "The principal inquiry in determining content neutrality * * * is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose [in enacting a statute] is the controlling consideration." That Sections 10 and 11 are content based is not the end of our inquiry, however. Although [**357] presumptively invalid, content-based restrictions are nevertheless permissible in some instances.

IV

Ordinarily, we would ascertain at this point whether Sections 10 and 11 are narrowly tailored to serve a compelling State interest. Before applying strict scrutiny, however, we depart reluctantly from what we consider traditional First Amendment jurisprudence to analyze our statutes in light of Justice Scalia's five-member majority opinion in R.A.V., supra, 505 U.S. , 112 S.Ct. 2538, 120 L.Ed.2d 305. Although we are frank to confess that our reasoning in that case would have differed from Justice Scalia's, we recognize our inflexible obligation to review the constitutionality of our own statutes using his premises. See Battaglia v. Union County Welfare Bd., 88 N.J. 48, 60, 438 A.2d 530 (1981) (noting [*71] that New Jersey Supreme Court is "bound by the [United States] Supreme Court's interpretation and application of the First Amendment and its impact upon the states under the Fourteenth Amendment"), cert. denied, 456 U.S. 965, 102 S.Ct. 2045, 72 L.Ed.2d 490 (1982).

In R.A.V., the United States Supreme Court concluded that the Bias-Motivated Crime Ordinance of St. Paul, Minnesota, is unconstitutional because "it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses." 505 U.S. at , 112 S.Ct. at 2542, 120 L.Ed.2d at 316. The defendant in that case and several teenagers had burned a cross inside the fenced yard of an African-American family. Although the State could have punished the defendant's conduct under several statutes, including those prohibiting terroristic threats, arson, and criminal damage to property, id. at n. 1, 112 S.Ct. at 2541 n. 1, 120 L.Ed.2d at 315 n. 1, St. Paul chose to

charge the defendant under its Bias-Motivated Crime Ordinance, quoted supra, at 64, 642 A.2d at 353.

The defendant challenged the St. Paul ordinance as "substantially overbroad and impermissibly content-based" under the First Amendment. 505 U.S. at , 112 S.Ct. at 2541, 120 L.Ed.2d at 315. The trial court dismissed the charge against the defendant, but the Minnesota Supreme Court reversed, holding that the ordinance reaches only fighting words and thus proscribes only expression that remains unprotected by the First Amendment. In re Welfare of R.A.V., 464 N.W.2d 507, 510 (1991). The Minnesota Supreme Court concluded that because the ordinance was narrowly tailored to promote a compelling government interest, it survived constitutional attack. Id. at 511.

In invalidating the ordinance, Justice Scalia accepted as authoritative the Minnesota Supreme Court's statement that "the ordinance reaches only those expressions that constitute 'fighting words' within the meaning of Chaplinsky[v. New Hampshire, 315 U.S. 568, 572, 62 S.Ct. 766, 769, 86 L.Ed. 1031, 1035 (1942) (defining "fighting words" as "conduct that itself inflicts injury or tends to incite immediate violence")]." R.A.V., supra, 505 U.S. at , [*72] 112 S.Ct. at 2542, 120 L.Ed.2d at 316. Justice Scalia then reasoned that although "[c]ontent-based regulations are presumptively invalid," id. at , 112 S.Ct. at 2542, 120 L.Ed.2d at 317, our society permits restrictions on "the content of speech in a few limited areas * * *." Id. at , 112 S.Ct. at 2542-43, 120 L.Ed.2d at 317 (citing Chaplinsky, supra, 315 U.S. at 572, 62 S.Ct. at 769, 86 L.Ed. at 1035). Those areas include obscenity, defamation, and fighting words. Id. at , 112 S.Ct. at 2543, 120 L.Ed.2d at 317. Justice Scalia pointed out that although the Supreme Court has sometimes said that those proscribable categories are "'not within the area of constitutionally protected speech'", ibid. (quoting Roth v. United States, 354 U.S. 476, 483, 77 S.Ct. 1304, 1308, 1 L.Ed.2d 1498, 1506 (1957)), that proposition is not literally true. Id. at , 112 S.Ct. at 2543, 120 L.Ed.2d at 317-18. In fact, those areas of proscribable speech can "be made vehicles for content discrimination * * *." Id. at , 112 S.Ct. at 2543, 120 L.Ed.2d at 318. Thus, the Supreme Court reads the First Amendment to impose a content-discrimination limitation on a State's prohibition of proscribable speech. Id. at , 112 S.Ct. at 2545-46, 120 L.Ed.2d at 320.

Justice Scalia, however, noted exceptions to the prohibition against content discrimination [**358] in the area of proscribable speech. The first exception to the prohibition exists "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable." Id. at , 112 S.Ct. at 2545, 120 L.Ed.2d at 320-21. A second exception is found when a "subclass [of proscribable speech] happens to be associated with particular 'secondary effects' of the speech, so that the regulation is 'justified without reference to the content of the * * * speech.'" Id. at , 112 S.Ct. at 2546, 120 L.Ed.2d at 321 (quoting Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48, 106 S.Ct. 925, 929, 89 L.Ed.2d 29, 38 (1986)). The final classification is a catch-all exception for those cases in which "the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot." Id. at , 112 S.Ct. at 2547, 120 L.Ed.2d at 322.

[*73] Applying the foregoing principles, Justice Scalia determined that the St. Paul ordinance is facially unconstitutional, even if read as construed by

the Minnesota Supreme Court to reach only "fighting words." Id. at , 112 S.Ct. at 2547, 120 L.Ed.2d at 323. The vice of the ordinance, as perceived by the Supreme Court majority, is that it is content discriminatory; in fact, the ordinance "goes even beyond mere content discrimination to actual viewpoint discrimination." Id. at , 112 S.Ct. at 2547, 120 L.Ed.2d at 323. "Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics[: race, color, creed, religion, or gender]." Id. at , 112 S.Ct. at 2547, 120 L.Ed.2d at 323.

Justice Scalia found that the St. Paul ordinance does not fall within any of the exceptions to the prohibition on content discrimination. The ordinance does not fit within the first exception for content discrimination -- the entire class of speech is proscribable -- because

fighting words are categorically excluded from the protection of the First Amendment [because] their content embodies a particularly intolerable (and socially unnecessary) mode of expressing whatever idea the speaker wishes to convey. St. Paul has not singled out an especially offensive mode of expression * * *. Rather, it has proscribed fighting words of whatever manner that communicate messages of racial, gender, or religious intolerance.

[Id. at , 112 S.Ct. at 2548-49, 120 L.Ed.2d at 324.]

Nor does the ordinance fit within the second exception -- discrimination aimed only at secondary effects -- because neither listeners' reactions to speech nor the emotive impact of speech is a secondary effect. Id. at , 112 S.Ct. at 2549, 120 L.Ed.2d at 325 (citing Boos v. Barry, 485 U.S. 312, 321, 108 S.Ct. 1157, 1163-64, 99 L.Ed.2d 333, 344-45 (1988)). Finally, Justice Scalia concluded that "[i]t hardly needs discussion that the ordinance does not fall within [the third] more general exception permitting all selectivity that for any reason is beyond the suspicion of official suppression of ideas." Id. at , 112 S.Ct. at 2549, 120 L.Ed. at 325.

Applying R.A.V. to this appeal, we conclude that even if we were to read Sections 10 and 11 to regulate only fighting words, a [*74] class of proscribable speech, those statutes do not fit within any of the exceptions to the prohibition against content discrimination.

The Attorney General argues that because Sections 10 and 11 regulate only threats of violence, those sections fall within the first exception for content discrimination -- the entire class of speech is proscribable. In discussing threats under the first exception Justice Scalia pointed out that

the Federal Government can criminalize [] those threats of violence that are directed against the President, see 18 U.S.C. @ 871, since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the President.

[Id. at , 112 S.Ct. at 2546, 120 L.Ed.2d at 321.]

But Justice Scalia observed that "the Federal Government may not criminalize only those threats against the President that mention his policy on aid to

inner cities." Ibid.

[**359] We see two shortcomings in the Attorney General's argument that because our statutes are permissible regulations of threats, they fit within the first exception. First, the statutes do not prohibit only threats. Section 10 prohibits "put[ing] or attempt[ing] to put another in fear of bodily violence by placing on public or private property a symbol * * * that exposes another to threats of violence, contempt or hatred on the basis of race, color, creed or religion * * *." (Emphasis added.) Section 11 precludes "defac[ing] or damag[ing] * * * private premises or property * * * by placing thereon a symbol * * * that exposes another to threats of violence, contempt or hatred on the basis of race, color, creed or religion * * *." (Emphasis added.) Thus, Sections 10 and 11 proscribe not only threats of violence but also expressions of contempt and hatred. Moreover, on close examination the "contempt and hatred" language may pose vagueness and overbreadth issues. We need not address those issues, however, because we could apply a limiting construction to restrict the application of Sections 10 and 11 only to threats of violence.

[*75] But even if we were somehow to construe Sections 10 and 11 to proscribe only threats of violence, we would encounter another problem: our statutes proscribe threats "on the basis of race, color, creed or religion." Under the Supreme Court's ruling in R.A.V., that limitation renders the statutes viewpoint-discriminatory and thus impermissible. Although a statute may prohibit threats, it may not confine the prohibition to only certain kinds of threats on the basis of their objectionable subject matter. Thus, the first exception cannot save Sections 10 and 11.

Nor does the second exception for discrimination aimed only at secondary effects rescue Sections 10 and 11. The only secondary effects the statutes arguably could target are the same secondary effects the St. Paul ordinance targeted in R.A.V., namely, "'protect[ion] against the victimization of a person or persons who are particularly vulnerable because of their membership in a group that historically has been discriminated against.'" 505 U.S. at , 112 S.Ct. at 2549, 120 L.Ed.2d at 325 (quoting Brief for Respondent, City of St. Paul). Thus, Sections 10 and 11 fail for the same reason that the St. Paul ordinance failed: secondary effects do not include listeners' reactions to speech or the emotive impact of speech. Id. at , 112 S.Ct. at 2549, 120 L.Ed.2d at 325.

Finally, just as in R.A.V., our statutes do not fall within the third, more general exception for discrimination that is unrelated to official suppression of ideas. As we noted, supra at 67, 642 A.2d at 355, the Legislature enacted Sections 10 and 11 specifically to outlaw messages of racial or religious hatred. Thus, we cannot say that Sections 10 and 11 are unrelated to the official suppression of ideas.

The decisions of other State courts support our conclusion that Sections 10 and 11 do not fall within any of the exceptions to the prohibition on content discrimination. See Sheldon, supra, 629 A.2d at 761-62, (concluding that Maryland statute precluding "burn[ing] or caus[ing] to be burned any cross or other religious symbol upon any private or public property" did not fall within [*76] any of the R.A.V. exceptions); Talley, supra, 858 P.2d at 231 (finding that Washington statute prohibiting "(a) Cross Burning; or (b) Defacement of the property of the victim or a third person with symbols or words when the

symbols or words historically or traditionally connote hatred or threats toward the victim" falls squarely within the prohibitions of R.A.V.). But see In re M.S., 22 Cal.App.4th 988, 22 Cal.Rptr.2d 560, 570-71 (Ct.App.1993) (finding that California statute providing that no person may "by force or threat of force, willfully injure, intimidate or interfere with, oppress, or threaten any other person * * * because of the other person's race, color, ancestry, national origin, or sexual orientation," and that "no person shall be convicted * * * based upon speech alone, [unless] the speech itself threatened violence" falls within all three R.A.V. exceptions).

V

Strict scrutiny requires that a regulation be narrowly drawn to achieve a compelling state interest. Burson v. Freeman, [**360] 504 U.S. , , 112 S.Ct. 1846, 1851, 119 L.Ed.2d 5, 14 (1992). So exacting is the inquiry under strict scrutiny that the Supreme Court "readily acknowledges that a law rarely survives such scrutiny * * *." Id. at , 112 S.Ct. at 1852, 119 L.Ed.2d at 15. "The existence of adequate content-neutral alternatives * * * 'undercut[s] significantly' any defense [that a] statute [is narrowly-tailored]." R.A.V., supra, 505 U.S. at , 112 S.Ct. at 2550, 120 L.Ed.2d at 326 (quoting Boos, supra, 485 U.S. at 329, 108 S.Ct. at 1168, 99 L.Ed.2d at 349).

In R.A.V., supra, the Supreme Court rejected the argument that the St. Paul ordinance survives strict scrutiny. 505 U.S. at , 112 S.Ct. at 2549-50, 120 L.Ed.2d at 325-26. Justice Scalia did find a compelling interest: "the ordinance helps to ensure the basic human rights of members of groups that have historically been subjected to discrimination * * *." Id. at , 112 S.Ct. at 2549, 120 L.Ed.2d at 325. But he concluded that the St. Paul ordinance is not narrowly tailored because "[a]n ordinance not [*77] limited to the favored topics, for example, would have precisely the same beneficial effect." Id. at , 112 S.Ct. at 2550, 120 L.Ed.2d at 326. Thus, the St. Paul ordinance is underinclusive and fails the strict-scrutiny analysis. Accord Sheldon, supra, 629 A.2d at 762-63 (finding that Maryland's statute fails strict scrutiny); Talley, supra, 858 P.2d at 230-31 (finding Washington statute unconstitutional).

We conclude that Sections 10 and 11 are underinclusive and thus impermissible under R.A.V. Sections 10 and 11 serve the same compelling state interest that the St. Paul ordinance served: protecting the human rights of members of groups that historically have been the object of discrimination. But our hate-crime statutes, like the St. Paul ordinance, are not narrowly tailored. R.A.V. dictates that where other content-neutral alternatives exist, a statute directed at disfavored topics is impermissible. Inasmuch as the language of Sections 10 and 11 limits their scope to the disfavored topics of race, color, creed, and religion, the statutes offend the First Amendment.

VI

The judgment of the trial court is reversed. The cause is remanded to the Law Division for entry there of judgment dismissing counts one through eight of the indictment and for further proceedings as may be appropriate on the remaining counts.

CONCURBY: STEIN

136 N.J. 56, *77; 642 A.2d 349, **360;
1994 N.J. LEXIS 430, ***1; 63 U.S.L.W. 2015

CONCUR: STEIN, J., concurring.

I join the Court's opinion declaring unconstitutional N.J.S.A. 2C:33-10 and -11, New Jersey's so-called hate-crime statutes. Variations of New Jersey's statutes have been enacted in most states, reflecting a national consensus that bias-motivated violence or bias-motivated conduct that tends to incite violence has reached epidemic proportions warranting the widespread enactment of laws criminalizing such behavior. I agree especially with the Court's acknowledgment, ante at 61, 642 A.2d at 352, that we declare New Jersey's hate-crime statutes unconstitutional because [*78] we are compelled to do so by the United States Supreme Court's decision in R.A.V. v. City of St. Paul, 505 U.S. , 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992), a decision that the Court characterizes as one requiring that "we depart reluctantly from what we consider traditional First Amendment jurisprudence * * *." Ante at 70, 642 A.2d at 357.

I write separately to explain my disagreement and dismay over the United States Supreme Court's decision in R.A.V. My views concerning the merits of the Supreme Court's opinion in R.A.V. are, of course, irrelevant to our disposition of this appeal. In cases that turn on interpretations of the United States Constitution, our mandate is simple -- to adhere to the decisions of our nation's highest Court, whose authority is final. Criticism by a state court judge addressed to a Supreme Court decision interpreting the federal Constitution might be regarded as intemperate, tending "inevitab[ly] [to shadow] the moral authority of the United States Supreme Court." State v. Hempele, 120 N.J. 182, 226, 576 A.2d 793 (1990) (O'Hern, J., concurring in part and dissenting in part). As Justice O'Hern observed in Hempele:
[**361] Throughout our history, we have maintained a resolute trust in that Court as the guardian of our liberties.

The most distinct aspect of our free society under law is that all acts of government are subject to judicial review. Whether we have agreed with the Supreme Court or not, we have cherished most its right to make those judgments. In no other society does the principle of judicial review have the moral authority that it has here.

[Ibid.]

The R.A.V. decision, however, is extraordinary. Its principal impact is to invalidate the hate-crime statutes of New Jersey and of numerous other states, statutes that undoubtedly were drafted with a view toward compliance with First Amendment standards. See, e.g., State v. Sheldon, 332 Md. 45, 629 A.2d 753, 763 (1993); State v. Ramsey, 430 S.E.2d 511, 514-15 (S.C.1993); State v. Talley, 122 Wash.2d 192, 858 P.2d 217, 230 (1993). That effect alone warrants close examination of R.A.V.'s rationale, so substantial is the number of state legislatures that had determined that [*79] conduct constituting so-called "hate-crimes" should be criminalized, and that that objective could be achieved consistent with the First Amendment. See Talley, supra, 858 P.2d at 219 (noting that "[n]early every state has passed what has come to be termed a 'hate crimes statute'"); see also Hate Crimes Statutes: A 1991 Status Report, ADL Law Report (Anti-Defamation League of B'nai B'rith, New York, N.Y.), 1991, at 6-10 (describing types of hate-crime statutes enacted by various states) (hereinafter 1991 Status Report). If only to learn where they went astray, state legislators, as well as their constituents whose complaints inspired enactment of hate-crime laws, have a special interest in understanding R.A.V.'s holding.

Another, and more disconcerting, aspect of the Supreme Court's decision in R.A.V., given its national significance, is the severity and intensity of the criticism that the four concurring members addressed to the rationale adopted by the majority opinion. Those members joined the Court's judgment only, not its opinion. Their objections to the Court's opinion convey a sense of astonishment about the Court's unexpected treatment of the First Amendment questions. Justice White observed:

But in the present case, the majority casts aside long-established First Amendment doctrine without the benefit of briefing and adopts an untried theory. This is hardly a judicious way of proceeding, and the Court's reasoning in reaching its result is transparently wrong.

* * *

Today, the Court has disregarded two established principles of First Amendment law without providing a coherent replacement theory. Its decision is an arid, doctrinaire interpretation, driven by the frequently irresistible impulse of judges to tinker with the First Amendment. The decision is mischievous at best and will surely confuse the lower courts. I join the judgment, but not the folly of the opinion.

[505 U.S. at , , 112 S.Ct. at 2551, 2560, 120 L.Ed.2d at 328, 339.]

Justice Blackmun's concurring opinion questioned the majority's true objectives:

[*80] I regret what the Court has done in this case. The majority opinion signals one of two possibilities: it will serve as precedent for future cases, or it will not. Either result is disheartening.

* * *

In the second instance is the possibility that this case will not significantly alter First Amendment jurisprudence, but, instead, will be regarded as an aberration -- a case where the Court manipulated doctrine to strike down an ordinance whose premise it opposed, namely, that racial threats and verbal assaults are of greater harm than other fighting words. I fear that the Court has been distracted from its proper mission by the temptation to decide the issue over "politically correct speech" and "cultural diversity," neither of which is presented here. If this is the meaning of today's opinion, it is perhaps even more regrettable.

I see no First Amendment values that are compromised by a law that prohibits [**362] hoodlums from driving minorities out of their homes by burning crosses on their lawns, but I see great harm in preventing the people of Saint Paul from specifically punishing the race-based fighting words that so prejudice their community.

[505 U.S. at , 112 S.Ct. at 2560-61, 120 L.Ed.2d at 339.]

The concurring opinion of Justice Stevens emphasizes, as did Justice White's, the extent of R.A.V.'s departure from generally-accepted First Amendment principles:

Within a particular "proscribable" category of expression, the Court holds, a government must either proscribe all speech or no speech at all. This aspect of the Court's ruling fundamentally misunderstands the role and constitutional status of content-based regulations on speech, conflicts with the very nature of First Amendment jurisprudence, and disrupts well-settled principles of First Amendment law.

* * *

In sum, the central premise of the Court's ruling -- that "[c]ontent-based regulations are presumptively invalid" -- has simplistic appeal, but lacks support in our First Amendment jurisprudence. To make matters worse, the Court today extends this overstated claim to reach categories of hitherto unprotected speech and, in doing so, wreaks havoc in an area of settled law. Finally, although the Court recognizes exceptions to its new principle, those exceptions undermine its very conclusion that the St. Paul ordinance is unconstitutional. Stated directly, the majority's position cannot withstand scrutiny. [505 U.S. at , , 112 S.Ct. at 2562-63, 2566, 120 L.Ed.2d at 341-42, 345-46 (footnote omitted).]

My focus is on the central holding and, in my view, the basic flaw in the R.A.V. opinion: that the St. Paul Bias-Motivated Crime Ordinance impermissibly regulates speech based on its content, 505 U.S. at , 112 S.Ct. at 2547, 120 L.Ed.2d at 323, [*81] and on its viewpoint, ibid., and cannot be sustained on the ground that the ordinance is narrowly tailored to serve compelling state interests. Id. at , 112 S.Ct. at 2549-50, 120 L.Ed.2d at 325-26.

I

Using language substantially similar to that contained in New Jersey's hate-crime statutes, N.J.S.A. 2C:33-10 and -11, the St. Paul, Minnesota, Bias-Motivated Crime Ordinance, invalidated by the Court in R.A.V., provided:

"Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor." [Id. at , 112 S.Ct. at 2541, 120 L.Ed.2d at 315 (quoting St. Paul, Minn. Legis.Code @ 292.02 (1990)).]

The defendant in R.A.V. was prosecuted under the St. Paul Bias-Motivated Crime Ordinance because he, along with some teenagers, had burned a cross during the night inside the fenced yard of a house occupied by an African-American family. The trial court dismissed the charge before trial, concluding that the ordinance prohibited expressive conduct in violation of the First Amendment. The Minnesota Supreme Court reversed, construing the ordinance as prohibiting only "'fighting words' -- conduct that itself inflicts injury or tends to incite immediate violence." In re Welfare of R.A.V., 464 N.W.2d 507, 510 (1991) (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572, 62 S.Ct. 766, 769, 86 L.Ed. 1031, 1035 (1942)). Concluding that the ordinance prohibited only conduct unprotected by the First Amendment and was "narrowly tailored * * * [to accomplish] the compelling governmental interest in protecting the community against bias-motivated threats to public safety and order," the Minnesota

Supreme Court sustained the validity of the St. Paul ordinance. Id. at 511.

The R.A.V. Supreme Court majority opinion declined to address the contention that the St. Paul ordinance was invalidly overbroad. [**363] 505 U.S. at , 112 S.Ct. at 2542, 120 L.Ed.2d at 316. The [*82] concurring Justices, however, agreed with Justice White's conclusion that although the Minnesota Supreme Court had construed the ordinance to prohibit only fighting words, the Minnesota Court nevertheless had emphasized that the ordinance prohibits "'only those displays that one knows or should know will create anger, alarm or resentment based on racial, ethnic, gender or religious bias.'" Id. at , 112 S.Ct. at 2559, 120 L.Ed.2d at 338 (White, J., concurring in the judgment) (quoting In re Welfare of R.A.V., supra, 464 N.W.2d at 510); see id. at , 112 S.Ct. at 2561, 120 L.Ed.2d at 339 (Blackmun, J., concurring in the judgment); id. at , 112 S.Ct. at 2561, 120 L.Ed.2d at 340 (Stevens, J., concurring in the judgment). Justice White, understanding the Minnesota Supreme Court to have ruled "that St. Paul may constitutionally prohibit expression that 'by its very utterance' cause 'anger, alarm or resentment,'" 505 U.S. at , 112 S.Ct. at 2559, 120 L.Ed.2d at 338, concluded that the ordinance was invalid because of overbreadth:

> Our fighting words cases have made clear, however, that such generalized reactions are not sufficient to strip expression of its constitutional protection. The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected.
>
> In the First Amendment context, "[c]riminal statutes must be scrutinized with particular care; those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application." Houston v. Hill, 482 U.S. 451, 459, 107 S.Ct. 2502, 2508, 96 L.Ed.2d 398 (1987) (citation omitted). The St. Paul antibias ordinance is such a law. Although the ordinance reaches conduct that is unprotected, it also makes criminal expressive conduct that causes only hurt feelings, offense, or resentment, and is protected by the First Amendment. The ordinance is therefore fatally overbroad and invalid on its face.
> [Id. at , 112 S.Ct. at 2559-60, 120 L.Ed.2d at 338-39 (citations omitted) (footnote omitted).]

Ignoring the overbreadth issue, the Supreme Court majority opinion accepted as authoritative the Minnesota Supreme Court's determination that the St. Paul ordinance reached only conduct that amounts to fighting words, in accordance with Chaplinsky, supra, 315 U.S. at 572, 62 S.Ct. at 769, 86 L.Ed. at 1035 (defining "fighting words" as "conduct that itself inflicts injury or tends to incite immediate violence"). R.A.V., supra, 505 U.S. at , 112 [*83] S.Ct. at 2541, 120 L.Ed.2d at 316. The Court acknowledged that fighting words, along with defamation and obscenity, are among the categories of speech with respect to which restrictions on content are permitted because they are "'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" Id. at , 112 S.Ct. at 2543, 120 L.Ed.2d at 317 (quoting Chaplinsky, supra, 315 U.S. at 572, 62 S.Ct. at 769, 86 L.Ed. at 1035). Although the Supreme Court has said that those proscribable categories of expression are "'not within the area of constitutionally protected speech,'" ibid. (quoting Roth v. United States, 354 U.S. 476, 483, 77 S.Ct. 1304, 1308, 1 L.Ed.2d 1498, 1506 (1957)), the R.A.V. majority opinion observed that that characterization is not

literally true, noting that those categories of speech "can * * * be regulated because of their constitutionally proscribable content," but cannot be made "the vehicles for content discrimination unrelated to their distinctively proscribable content." Id. at , 112 S.Ct. at 2543, 120 L.Ed.2d at 318. Accordingly, the Court noted: "The government may not regulate use [of fighting words] based on hostility -- or favoritism -- towards the underlying message expressed." Id. at , 112 S.Ct. at 2545, 120 L.Ed.2d at 320.

Having established its basic premise that even fighting words, a category of generally-proscribable speech, can be a vehicle for content discrimination, the R.A.V. opinion concludes that the St. Paul ordinance is facially unconstitutional because it impermissibly discriminates based on the subject of bias-motivated speech. Id. at , 112 S.Ct. at 2547-48, 120 L.Ed.2d at 323-24. The Court notes that the St. Paul ordinance applies [**364] only to fighting words that provoke violence "on the basis of race, color, creed, religion or gender"; but that those who wish to use fighting words -- "to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality -- are not covered." Id. at , 112 S.Ct. at 2547, 120 L.Ed.2d at 323. The Court determined that that distinction in the content of the speech regulated by the St. Paul ordinance was unconstitutional: "The First [*84] Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects." Ibid. In effect, the Court concluded that St. Paul could regulate all fighting words or none, but could not single out for regulation only those fighting words that provoke violence based on race, color, creed, religion, or gender.

The Court then determined that the St. Paul ordinance also constituted viewpoint discrimination:

> "Fighting words" that do not themselves invoke race, color, religion, or gender -- aspersions upon a person's mother, for example -- would seemingly be usable [at pleasure] in the placards of those arguing in favor of racial, color, etc. tolerance and equality, but could not be used by the speaker's opponents. * * * St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules.
>
> [Ibid.]

In that respect the majority opinion viewed the St. Paul ordinance as one taking sides in a dispute between racists and their targets. "By prohibiting fighting words based on race, while allowing other fighting words, the law barred only the fighting words that the racists (and not the fighting words that their targets) would wish to use." Elena Kagan, The Changing Faces of First Amendment Neutrality: R.A.V. v. St. Paul, Rust v. Sullivan, and the Problem of Content-Based Underinclusion, 1992 Sup.Ct.Rev. 29, 70.

In prohibiting fighting words that provoke violence only on the basis of race, color, creed, religion, or gender, the St. Paul ordinance obviously regulates "speech" based on its content: speech that provokes violence because it is addressed to the five prohibited subjects is barred; speech that provokes violence because it is addressed to other subjects -- political affiliation, union membership, or homosexuality, for example -- is not barred. Aside from overbreadth problems, Justices White and Stevens, although for different reasons, would have upheld the ordinance even though they acknowledged that it regulated speech based on its content. In the view of Justice White, the

majority's concession that the St. Paul ordinance regulates only fighting words to which "the First Amendment does not apply * * * because their expressive [*85] content is worthless or of de minimis value to society," 505 U.S. at , 112 S.Ct. at 2552, 120 L.Ed.2d at 328, (White, J., concurring), establishes that a content-based regulation of fighting words is insulated from First Amendment review:

It is inconsistent to hold that the government may proscribe an entire category of speech because the content of that speech is evil, [New York v. Ferber, 458 U.S. 747, 763-64, 102 S.Ct. 3348, 3358-59, 73 L.Ed.2d 1113, 1126-27 (1982)]; but that the government may not treat a subset of that category differently without violating the First Amendment; the content of the subset is by definition worthless and undeserving of constitutional protection.

[Id. at , 112 S.Ct. at 2553, 120 L.Ed.2d at 330.]

In addition, Justice White urged that even if the ordinance constituted a content-based regulation of protected expression, it would survive strict-scrutiny review as a regulation serving a compelling state interest narrowly drawn to achieve that purpose. Rejecting the majority's observation that the St. Paul ordinance could not survive strict scrutiny because "[a]n ordinance not limited to the favored topics would have precisely the same beneficial effect," id. at , 112 S.Ct. at 2541, 120 L.Ed.2d at 325, Justice White relied on Burson v. Freeman, 504 U.S. , 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992), in which a plurality of the Court sustained a Tennessee statute prohibiting the solicitation of votes and the distribution of campaign literature [**365] within one-hundred feet of the entrance to a polling place. Noting that the statute in Burson restricted only political speech, Justice White observed that the Burson plurality had

squarely rejected the proposition that the legislation failed First Amendment review because it could have been drafted in broader, content-neutral terms: "States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist." [505 U.S. at , 112 S.Ct. at 2555, 120 L.Ed.2d at 332 (quoting Burson, supra, 504 U.S. at , 112 S.Ct. at 1856, 119 L.Ed.2d at 20) (emphasis added).]

Justice Stevens was unwilling to rely on the majority's concession that the St. Paul ordinance regulates only fighting words, observing that "[t]he categorical approach sweeps too broadly when it declares that all such expression is beyond the protection of the First Amendment." Id. at , 112 S.Ct. at 2566-67, 120 L.Ed.2d at 347 (Stevens, J., concurring). In that respect Justice [*86] Stevens's view is consistent with that of commentators who have urged abandonment of or diminished reliance on the fighting-words doctrine. See, e.g., Laurence H. Tribe, American Constitutional Law, @ 12-18, at 929 n. 9 (2d ed. 1988); Stephen W. Gard, Fighting Words as Free Speech, 58 Wash.U.L.Q. 531 (1980); Kenneth L. Karst, Equality as a Central Principle in the First Amendment, 43 U.Chi.L.Rev. 20, 30-35 (1975); Nadine Strossen, Regulating Racist Speech on Campus: A Modest Proposal?, 1990 Duke L.J. 484, 508-14. Rejecting the categorical approach as one that "sacrifices subtlety for clarity," 505 U.S. at , 112 S.Ct. at 2566, 120 L.Ed.2d at 346, Justice Stevens similarly rejected as "absolutism" the majority's view that content-based regulations, even of fighting words, are presumptively invalid. Id. at , 112 S.Ct. at 2564, 120 L.Ed.2d at 343. Observing that selective regulation of speech based on content was unavoidable, Justice Stevens noted that the Court frequently had upheld content-based regulations of speech. Ibid. (citing FCC v. Pacifica Found.,

438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978) (upholding restriction on broadcast of specific indecent words); Young v. American Mini Theatres, Inc., 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (upholding zoning ordinances that regulated movie theaters based on content of films shown); Lehman v. City of Shaker Heights, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974) (upholding ordinance prohibiting political advertising but permitting commercial advertising on city buses); Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973) (upholding state statute restricting speech of state employees concerning partisan political matters)).

As an alternative to Justice White's categorical approach and the majority's formulation that content-based regulation is presumptively invalid, Justice Stevens observed that the Court's First Amendment jurisprudence reveals "a more complex and subtle analysis, one that considers the content and context of the regulated speech, and the nature and scope of the restriction on speech." 505 U.S. at , 112 S.Ct. at 2567, 120 L.Ed.2d at 347. Justice Stevens explained that "the scope of protection provided expressive [*87] activity depends in part upon its content and character," id. at , 112 S.Ct. at 2567, 120 L.Ed.2d at 348, noting that the First Amendment accords greater protection to political speech than to commercial speech or to sexually explicit speech, id. at , 112 S.Ct. at 2567-68, 120 L.Ed.2d at 348, and that "'government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word.'" Id. at , 112 S.Ct. at 2568, 120 L.Ed.2d at 348 (quoting Texas v. Johnson, 491 U.S. 397, 406, 109 S.Ct. 2533, 2540, 105 L.Ed.2d 342, 354-55 (1989)). Moreover, he noted that the context of the regulated speech affects the scope of protection afforded it. Thus, "the presence of a '"captive audience,"'" ibid. (quoting Lehman, supra, 418 U.S. at 302, 94 S.Ct. at 2717, 41 L.Ed.2d at 776 (quoting Public Util. Comm'n v. Pollack, 343 U.S. 451, 468, 72 S.Ct. 813, 823, 96 L.Ed. 1068, 1080 (1952) (Douglas, J., dissenting))), or "the distinctive character of a secondary-school environment," ibid., affects the Court's First Amendment analysis. Similarly, Justice Stevens observed that the nature of a restriction [**366] on speech "informs our evaluation of its constitutionality," id. at , 112 S.Ct. at 2568, 120 L.Ed.2d at 348-49, noting that restrictions based on viewpoint are regarded as more pernicious than those based only on subject matter. Id. at , 112 S.Ct. at 2568, 120 L.Ed.2d at 349. Finally, Justice Stevens noted that the scope of content-based restrictions affect their validity. Id. at , 112 S.Ct. at 2569, 120 L.Ed.2d at 349.

That analytical framework illuminates the critical distinction between Justice Stevens' evaluation of the St. Paul ordinance and that of the majority. The Court's approach is presumptive and categorical. The majority concluded that the St. Paul ordinance distinguishes -- as it surely does -- between fighting words addressed to the restricted subjects and all other fighting words. Viewing that distinction as one based impermissibly on content, the Court rejected the contention that the ordinance is narrowly tailored to serve compelling state interests because "[a]n ordinance not limited to the favored topics * * * would have precisely [*88] the same beneficial effect." Id. at , 112 S.Ct. at 2549, 120 L.Ed.2d at 326.

In sharp contrast, Justice Stevens first assessed the content and character of the regulated activity, noting that the ordinance applies only to "low-value speech, namely, fighting words," and that it regulates only "'expressive conduct [rather] than * * * the written or spoken word.'" Id. at , 112 S.Ct. at

2569, 120 L.Ed.2d at 350 (quoting Johnson, supra, 491 U.S. at 406, 109 S.Ct. at 2540, 105 L.Ed.2d at 355) (alterations in original). Concerning context, he noted that the ordinance restricts speech only "in confrontational and potentially violent situations," ibid., such as that illustrated by the case at hand: "The cross-burning in this case -- directed as it was to a single African-American family trapped in their home -- was nothing more than a crude form of physical intimidation. That this crossburning sends a message of racial hostility does not automatically endow it with complete constitutional protection." Ibid. Finally, Justice Stevens concluded that St. Paul's restriction on speech is based neither on subject matter nor viewpoint, "but rather on the basis of the harm the speech causes. * * * [T]he ordinance regulates only a subcategory of expression that causes injuries based on 'race, color, creed, religion or gender,' not a subcategory that involves discussions that concern those characteristics." Id. at , 112 S.Ct. at 2570, 120 L.Ed.2d at 350-51.

II

Regulation of speech based on content, subject matter, or viewpoint has attracted an outpouring of scholarly commentary. See, e.g., Daniel A. Farber, Content Regulation and the First Amendment: A Revisionist View, 68 Geo.L.J. 727 (1980); Karst, supra, 43 U.Chi.L.Rev. 20; Martin H. Redish, The Content Distinction in First Amendment Analysis, 34 Stan.L.Rev. 113 (1981); Frederick Schauer, Categories and the First Amendment: A Play in Three Acts, 34 Vand.L.Rev. 265 (1981); Paul B. Stephan III, The First Amendment and Content Discrimination, 68 Va.L.Rev. 203 [*89] (1982); Geoffrey R. Stone, Content Regulation and the First Amendment, 25 Wm. & Mary L.Rev. 189 (1983); Geoffrey R. Stone, Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions, 46 U.Chi.L.Rev. 81 (1978); Cass R. Sunstein, Words, Conduct, Caste, 60 U.Chi.L.Rev. 795 (1993). Although variations in the formulation of contentbased regulation of speech may present difficult and controversial First Amendment questions, courts need not abandon pragmatism and common sense in favor of "arid, doctrinaire interpretation." R.A.V., supra, 505 U.S. at , 112 S.Ct. at 2560, 120 L.Ed.2d at 339 (White, J., concurring). Even those commentators who advocate a categorical approach to First Amendment adjudication acknowledge the need to allow for enough play in the joints to avoid anomalous results:

> What we mean when we express animosity towards content regulation is that we should not create subcategories within the first amendment that are inconsistent with the theoretical premises of the concept of freedom of speech. Moreover, we do not wish to create subcategories that, either because of the inherent indeterminacy of the category or because of the difficulty in [**367] verbally describing that subcategory, create an undue risk of oversuppression. While these are powerful reasons, they are not so conclusive that they should prevail in every case. When strong reasons for creating a subcategory present themselves, and when the dangers can be minimized or eliminated, the mechanized uttering of "content regulation" need not prevent the embodiment in first amendment doctrine of the plain fact that there are different varieties of speech.
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> [Schauer, supra, 34 Vand.L.Rev. at 290 (footnote omitted).]

Although the Supreme Court divided five to four on the constitutionality of the St. Paul ordinance (apart from the issue of overbreadth), I find

incontestable the superiority of the balancing test advocated by Justice Stevens compared with the categorical and presumptive approach adopted by the R.A.V. majority. To hold the St. Paul ordinance presumptively invalid because it fails to criminalize fighting words addressed to topics other than race, color, creed, religion, or gender ignores not only established First Amendment jurisprudence but also common experience as well.

The R.A.V. majority takes pains to classify the primary vice of the St. Paul ordinance not as "underinclusiveness" but as "content discrimination": "In our view, the First Amendment imposes not [*90] an 'underinclusiveness' limitation but a 'content discrimination' limitation upon a State's prohibition of proscribable speech." R.A.V., supra, 505 U.S. at , 112 S.Ct. at 2545, 120 L.Ed.2d at 320. But when the R.A.V. majority explains what it means by content discrimination, its explanation underscores that the "discrimination" in content that renders St. Paul's ordinance facially invalid derives solely from St. Paul's failure to have expanded the breadth of the ordinance to criminalize fighting words addressed to other subjects -- in other words, the ordinance is "underinclusive":

Although the phrase in the ordinance, "arouses anger, alarm or resentment in others," has been limited by the Minnesota Supreme Court's construction to reach only those symbols or displays that amount to "fighting words," the remaining, unmodified terms make clear that the ordinance applies only to "fighting words" that insult, or provoke violence, "on the basis of race, color, creed, religion or gender." Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use "fighting words" in connection with other ideas -- to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality -- are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.

[Id. at , 112 S.Ct. at 2547, 120 L.Ed.2d at 323.]

But the R.A.V. Court's conclusion that "[t]he First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects" begs the very question that the Court has resolved differently in a number of cases involving underinclusive regulations of speech: whether a law targeting some but not all speech in a category is invalid as a content-based discrimination or is sustainable by deferring to the legislative judgment concerning which of several causes of a problem government elects to regulate. See William E. Lee, The First Amendment Doctrine of Underbreadth, 71 Wash.U.L.Q. 637, 638 (1993); Stone, supra, 25 Wm. & Mary L.Rev. at 202-07. Characteristically, the Court has invalidated underinclusive regulations under circumstances in which the governmental justification for singling out the burdened class or favoring the excluded class is considered insufficient. See, e.g., City of Cincinnati v. [*91] Discovery Network, Inc., 507 U.S. , 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993) (invalidating Cincinnati ordinance intended to promote aesthetics by prohibiting use of newsracks on public property to dispense commercial publications but permitting use of newsracks to dispense newspapers); Florida Star v. B.J.F., 491 U.S. 524, 540, 109 S.Ct. 2603, 2612, 105 L.Ed.2d 443, 459 (1989) (holding unconstitutional under First Amendment imposition of civil damages against newspaper that violated Florida statute by publishing [**368] identity of rape victim, noting that victim's identity had been lawfully obtained and statute was underinclusive in not prohibiting

dissemination of victim's identity by means other than publication in any "'instrument of mass communication'" (quoting Fla.Stat. @ 794.03 (1987)); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 234, 107 S.Ct. 1722, 1730, 95 L.Ed.2d 209, 223 (1987) (invalidating under First Amendment Arkansas sales tax that taxed general-interest magazines but exempted newspapers and religious, professional, trade, and sports journals, noting that Arkansas "advanced no compelling justification for selective content-based taxation of certain magazines"); First Nat'l Bank v. Bellotti, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978) (invalidating under First Amendment Massachusetts criminal statute prohibiting only banks and business corporations from making expenditures to influence vote on referendum proposals, and finding no compelling state interest sufficient to justify restrictions on corporate speech); Erznoznik v. City of Jacksonville, 422 U.S. 205, 215, 95 S.Ct. 2268, 2275, 45 L.Ed.2d 125, 134 (1975) (invalidating on First Amendment grounds ordinance prohibiting drive-in movie theaters with screens visible from public streets from showing films containing nudity; observing that underinclusive classifications may be sustained on theory that government may "deal with one part of * * * problem without addressing all of it," but finding Jacksonville ordinance strikingly underinclusive and lacking any compelling governmental interest sufficient to sustain it); Police Dept. v. Mosley, 408 U.S. 92, 101-02, 92 S.Ct. 2286, 2293-94, 33 L.Ed.2d 212, 220 (1972) (invalidating on equal-protection grounds Chicago ordinance prohibiting all picketing, except [*92] peaceful labor picketing, within 150 feet of school buildings on ground that ordinance impermissibly relies on content-based distinction in defining allowable picketing; observing that governmental interest advanced by City was insufficient to justify content-based discrimination among pickets).

In other settings, however, the Court has not been reluctant to evaluate the governmental interest asserted in justification of allegedly-underinclusive restrictions on speech, and has determined that adequate reasons existed to justify piecemeal regulation. The most recent illustration of that approach is Burson, supra, 504 U.S. , 112 S.Ct. 1846, 119 L.Ed.2d 5, in which the Court upheld against a First Amendment challenge the validity of a Tennessee statute prohibiting the solicitation of votes and the display or distribution of campaign literature within one-hundred feet of the entrance to a polling place. The Court pointedly rejected the contention that the Tennessee statute was underinclusive for failing to regulate other forms of speech such as charitable and commercial solicitation and exit polling within that radius:

> [T]here is * * * ample evidence that political candidates have used campaign workers to commit voter intimidation or electoral fraud. In contrast, there is simply no evidence that political candidates have used other forms of solicitation or exit polling to commit such electoral abuses. States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist.
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> [Id. at , 112 S.Ct. at 1856, 119 L.Ed.2d at 19-20.]

Other cases sustaining allegedly underinclusive regulation of speech include Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 666, 110 S.Ct. 1391, 1401, 108 L.Ed.2d 652, 668 (1990) (upholding against First Amendment challenge Michigan statute prohibiting corporations from using corporate funds for independent expenditures on behalf of or in opposition to candidates for state office, and finding regulation supported by compelling state interest in limiting political influence of accumulated corporate wealth; concerning

underinclusiveness challenge, Court determined that Michigan's decision "to exclude unincorporated labor unions from [statute] is therefore justified by the crucial differences between unions and corporations"); United States v. Kokinda, [*93] 497 U.S. 720, 724, 733, 110 S.Ct. 3115, 3118, 3128, 111 L.Ed.2d 571, 579-80, 586 (1990) (upholding against First Amendment challenge postal regulation barring "[s]oliciting alms and contributions, campaigning for election * * *, [**369] commercial soliciting and vending, and displaying or distributing commercial advertising" on Postal Service property; rejecting contention that regulation is underinclusive, Court characterized as "anomalous that the Service's allowance of some avenues of speech would be relied upon as evidence that it is impermissively suppressing other speech"); City Council v. Taxpayers for Vincent, 466 U.S. 789, 811, 104 S.Ct. 2118, 2132, 80 L.Ed.2d 772, 791 (1984) (upholding against First Amendment challenge by candidate for city council municipal ordinance prohibiting posting of signs on public property; concerning underinclusiveness challenge, Court finds that aesthetic interest in eliminating signs on public property not compromised by allowing signs on private property, and observing that citizen's interest in controlling use of own property justifies disparate treatment); Renton v. Playtime Theatres, 475 U.S. 41, 52-53, 106 S.Ct. 925, 931, 89 L.Ed.2d 29, 41 (1986) (upholding against First Amendment challenge zoning ordinance prohibiting adult motion-picture theatres from locating within 1,000 feet of residential zone, church, park, or school; rejecting underinclusiveness argument, Court stated: "That Renton chose first to address the potential problems created by one particular kind of adult business in no way suggests that the city has 'singled out' adult theaters for discriminatory treatment."); cf. FEC v. Massachusetts Citizens for Life, 479 U.S. 238, 258 n. 11, 107 S.Ct. 616, 628 n. 11, 93 L.Ed.2d 539, 557 n. 11 (1986) (holding section 316 of Federal Election Campaign Act, 2 U.S.C.A. @ 441b, which prohibits corporations from expending treasury funds in connection with elections to public office, unconstitutional as applied to nonprofit corporation formed to promote "pro-life" causes; rejecting underinclusiveness challenge and observing, "That Congress does not at present seek to regulate every possible type of firm fitting this description does not undermine its justification for regulating corporations.").

[*94] On at least one occasion the Court rejected an underinclusiveness challenge leveled at a statute criminalizing child pornography, a category of speech that the Court classified, as it had fighting words, as outside the realm of constitutionally-protected expression. Ferber, supra, 458 U.S. at 754, 763-64, 102 S.Ct. at 3353, 3358, 73 L.Ed.2d at 1120-21, 1126-27. The statute prohibited the promotion of sexual performances using children under the age of sixteen, and proof that the performances were obscene was not necessary to establish a violation. The New York Court of Appeals had determined that the statute was unconstitutionally underinclusive, in People v. Ferber, 52 N.Y.2d 674, 439 N.Y.S.2d 863, 422 N.E.2d 523 (1981), "because it discriminated against visual portrayals of children engaged in sexual activity by not also prohibiting the distribution of films of other dangerous activity." Ferber, supra, 458 U.S. at 752, 102 S.Ct. at 3352, 73 L.Ed.2d at 1120. Reversing, the Supreme Court characterized the statute as describing "a category of material the production and distribution of which is not entitled to First Amendment protection. It is therefore clear that there is nothing unconstitutionally 'underinclusive' about a statute that singles out this category of material for proscription." Id. at 765, 102 S.Ct. at 3359, 73 L.Ed.2d at 1128. The Court distinguished its holding from Erznoznik, supra, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125, in which the Jacksonville ordinance

impermissibly singled out movies with nudity for special treatment while failing to regulate other protected speech which created the same alleged risk to traffic. Today, we hold that child pornography as defined in @ 263.15 is unprotected speech subject to content-based regulation. Hence, it cannot be underinclusive or unconstitutional for a State to do precisely that. [Ferber, supra, 458 U.S. at 765 n. 18, 102 S.Ct. at 3359 n. 18, 73 L.Ed.2d at 1128 n. 18 (emphasis added).]

Justice Stevens's pointed observation that the R.A.V. majority opinion "wreaks havoc in an area of settled law," 505 U.S. at , 112 S.Ct. at 2566, 120 L.Ed.2d at 345, is better understood in the context of the Court's demonstrated flexibility in resolving claims of underinclusive regulation of expression. In rejecting an underinclusiveness challenge to a restriction of political speech -- a category [*95] of speech acknowledged to be entitled to the [**370] most comprehensive First Amendment protection, see William J. Brennan, Jr., The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 Harv.L.Rev. 1, 11-12 (1965) -- the Court in Burson, supra, readily deferred to the Tennessee legislature's determination that the regulated speech was the only form of expression requiring governmental restriction. 504 U.S. at , 112 S.Ct. at 1855-56, 119 L.Ed.2d at 19-20. And in Ferber, supra, in which child pornography was categorized, analogously to fighting words, as beyond the realm of constitutionally-protected expression, 458 U.S. at 763-64, 102 S.Ct. at 3358, 73 L.Ed.2d at 1126-27, the Court deemed it unnecessary to require any governmental justification for the statute's underinclusiveness. Id. at 765, 102 S.Ct. at 3359, 73 L.Ed.2d at 1128.

Had the R.A.V. majority accorded minimal deference to First Amendment precedent, it would have sustained the St. Paul ordinance (subject to overbreadth problems) by recognizing the obvious governmental interest in criminalizing that subset of fighting words addressed to the designated subjects (race, color, creed, religion, or gender) because bias-motivated threats that tend to incite violence are predominantly addressed to one or more of those subjects. See Mari J. Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 Mich.L.Rev. 2320 (1989) (detailing escalation of bias-related crime and urging criminalization of narrow class of racist speech); Hate Crime Statutes: A Response to Anti-Semitism, Vandalism and Violent Bigotry, ADL Law Report (Anti-Defamation League of B'nai B'rith, New York, N.Y.), Spring/Summer 1988 (summarizing statistical data describing most frequent victims and commonly reported forms of hate crimes and compiling relevant state and federal legislation). By including race, color, and religion among the proscribed topics of bias-motivated speech, St. Paul's governmental determination closely resembled that reached by Congress in enacting the Federal Hate Crime Statistics Act, Pub.L. No. 101-275 (codified at 28 U.S.C.A. @ 534 (note) (1990)), mandating that the Attorney General acquire data over a five-year period [*96] about "crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity * * *." Ibid. That St. Paul elected not to prohibit bias-motivated speech addressed to other topics reflects not a preference for one type of speech over another, but simply a decision by public officials to "address the problems that confront them." Burson, supra, 504 U.S. at , 112 S.Ct. at 1856, 119 L.Ed.2d at 20.

Closely related to the R.A.V. majority's reliance on content discrimination as a ground for invalidating the St. Paul ordinance is its insistence that the ordinance suffers from the additional flaw of discrimination on the basis of

viewpoint. R.A.V., supra, 505 U.S. at , 112 S.Ct. at 2547-48, 120 L.Ed.2d at 323. The R.A.V. majority theorizes that the St. Paul ordinance can be construed as choosing sides in a debate between racists and their targets, barring the use of fighting words by racists but allowing the targets of racists to retaliate by using fighting words. See Kagan, supra, 1992 Sup.Ct.Rev. at 70. That highly theoretical characterization of the St. Paul ordinance should be understood simply as another version of underinclusiveness: if the ordinance banned all fighting words, rather than only those addressed to the designated subjects, neither racists nor their targets would be disadvantaged. Two commentators who analyzed the claim of viewpoint discrimination disagreed on whether the St. Paul ordinance could be so classified. Compare Kagan, supra, 1992 Sup.Ct.Rev. at 70-74 (acknowledging that St. Paul ordinance, as applied but not facially, could effect form of viewpoint discrimination but asserting that such ordinances are sustainable if both necessary and narrowly tailored to serve compelling interest) with Sunstein, supra, 60 U.Chi.L.Rev. at 829 (stating, "Viewpoint discrimination is not established by the fact that in some hypotheticals, one side has greater means of expression than another * * * if the restriction on means has legitimate, neutral justifications."). Both Professors Kagan and Sunstein agree, however, that the validity of the St. Paul ordinance -- whether or not it may theoretically constitute viewpoint discrimination -- should be resolved by determining whether the special harm caused by the restricted speech justifies [*97] the governmental [**371] decision to single out that speech for special sanction. Kagan, supra, 1992 Sup.Ct.Rev. at 76; Sunstein, supra, 60 U.Chi.L.Rev. at 825.

The historical significance of the bias-related harm threatened by the speech restricted by St. Paul's ordinance underscores the fundamental imbalance in the majority's First Amendment analysis. By emphasizing those fighting words that St. Paul has determined it need not regulate, and underestimating the danger posed by the regulated expression, the majority "fundamentally miscomprehends the role of 'race, color, creed, religion [and] gender' in contemporary American society." R.A.V., supra, 505 U.S. at n. 9, 112 S.Ct. at 2570 n. 9, 120 L.Ed.2d at 351 n. 9 (Stevens, J., concurring) (alterations in original). The R.A.V. majority also overlooks the historical context that explains governmental determinations to single out as especially pernicious biasmotivated speech that incites violence based on race and color. One can recall an earlier time in which discrimination based on race and color was authorized by law:

Racial discrimination could be found in all parts of the United States. But it was different in the South, and far more virulent, because it had the force of law. State law condemned blacks to a submerged status from cradle to grave, literally. The law segregated hospitals and cemeteries. It confined black children to separate and grossly inferior public schools. Policemen enforced rules that made blacks ride in the back of the bus and excluded them from most hotels and restaurants. And blacks had little or no voice in making the law, for in much of the South they were denied the right to vote.

Officially enforced segregation was not some minor phenomenon found only in remote corners of the South. In the middle of the twentieth century black Americans could not eat in a restaurant or enter a movie theater in downtown Washington, D.C. Public schools were segregated in seventeen Southern and border states and in the District of Columbia: areas with 40 percent of the country's public school enrollment. Through two world wars black men were conscripted to serve in segregated units of the armed forces: a form of

federally sanctioned racism that was only ended by President Harry Truman in 1948.
[Anthony Lewis, Make No Law: The Sullivan Case and the First Amendment 15-16 (1991).]

Similarly, religious-based bias and discrimination was common-place during the first half of this century, and incidents of crime [*98] based on religious bigotry have increased significantly in recent years. See 1991 Status Report, supra, at 1.

As society strives to overcome the effects of institutionalized bigotry, the occurrence and resurgence of bias-motivated crime understandably provokes a governmental response. That response is informed not by an impulse to regulate expression discriminatorily based on content or viewpoint, but by a pragmatic desire to respond directly to the most virulent and dangerous formulation of bias-motivated incitements to violence. "While a cross-burning as part of a public rally in a stadium may fairly be described as protected speech, burning the same cross on the front lawn of [a] * * * neighbor has an entirely different character." John P. Stevens, The Freedom of Speech, 102 Yale L.J. 1293, 1310-11 (1993). An interpretation of the First Amendment that prevents government from singling out for regulation those inciteful strains of hate speech that threaten imminent harm will be incomprehensible to public officials and to the citizens whose interests such laws were enacted to protect.

That the Supreme Court's holding in R.A.V. binds us in our disposition of this appeal is indisputable. Whether it persuades us is another question entirely.

STEIN, J., concurs in the result.